

# RETROACTIVITY OF THE 1975 CALIFORNIA COMMUNITY PROPERTY REFORMS

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This year a series of statutes constituting the most significant, radical, and—so far as rights of women are concerned—fair, and nondiscriminatory revision of California's community property system becomes effective. Most of the reforms became effective on January 1, 1975, while the effective date for those concerning administration of decedent's estates is July 1.

The reform package was enacted after 2 years of study and hearings<sup>1</sup> that documented what several commentators had pointed out:<sup>2</sup> prior law, which discriminated against married women primarily in the area of management and control of community property, not only demeaned married women but effectively prohibited them from obtaining credit. Credit cards and charge accounts were usually issued only in the husband's name. If a marriage ended by divorce or the husband's death, the woman had no credit history as she began her new, unmarried life.

Under prior law, the husband (*H*), simply because he was male, had exclusive management and control of almost all community personal property.<sup>3</sup> The wife (*W*) acting alone, not under *H*'s authority

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1. See *Transcript of Hearing on Community Property of the California Legislature Joint Interim Committee on Judiciary on Community Property* (Sept.-Oct. 1972).

2. The extensive literature considering constitutionality of sexually discriminatory provisions in community property systems includes: Barham, *Equal Rights for Women Versus the Civil Code*, 48 TUL. L. REV. 560 (1974) [hereinafter cited as Barham]; Bilbe, *Constitutionality of Sex-Based Differentiations in the Louisiana Community Property Regime*, 19 LOYOLA L. REV. (La.) 373 (1973); Bingaman, *The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control*, 3 N. MEX. L. REV. 11 (1973); McKnight, *Matrimonial Property* (in *Annual Survey of Texas Law*), 26 SW. L.J. 31, 46-50 (1972) [hereinafter cited as McKnight]; Riley, *A Revision of the Property Law of Marriage, Why Now?*, 21 LA. B.J. 29 (1973); Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U.L. REV. 211, 231 n.131 (1973) (citing an unreported Arizona decision holding that state's pre-reform male management system unconstitutional); Note, *Management and Control of Community Property: Sex Discrimination in California*, 6 U. CAL. DAVIS L. REV. 383 (1973); Comment, *Community Property: Male Management and Women's Rights*, 1972 LAW & SOC. ORDER 163 (1972); Note, *The Equal Rights Amendment and Inequality Between Spouses Under the California Community Property System*, 6 LOYOLA L. REV. (Los Angeles) 66 (1973); Note, *Equal Rights and Equal Protection: Who Has Management and Control?*, 46 S. CAL. L. REV. 892 (1973); Comment, *Management of the Louisiana Community Property System: The Need for Reform*, 48 TUL. L. REV. 591 (1974).

3. Compare former CAL. CIV. CODE §§ 5125 and 5127 with former § 5124. (Citations herein to "former" sections of the California Civil Code refer, in the case of sections numbered in the 5000's, to the provisions of the statute immediately prior to amendment or repeal effective January 1, 1975, except in the case of § 5116 which was initially amended by the reform legislation effective January 1, 1974. Former Civil Code sections cited herein and numbered in the 100's were repealed effective January

as his agent, controlled only her own earnings and any community property awarded her for personal injuries. She lost this control to her husband if such funds were commingled with other community property that was not subject to her exclusive management.<sup>4</sup> Several commentators have suggested that this sex-based discrimination is unconstitutional as a result of California Supreme Court decisions that declared sex a suspect classification under the California equal protection clause.<sup>5</sup> In addition, the pre-1975 discriminatory system of management and control was arguably unconstitutional under the equal protection clause of the federal Constitution<sup>6</sup> and almost certainly would have been invalidated by the proposed federal Equal Rights Amendment.<sup>7</sup>

By 1973 other community property states offered two nondiscriminatory models that California could follow to reform its management and control system. In 1967 Texas enacted a system that can be termed "separate but equal."<sup>8</sup> Under it, each spouse has exclusive management and control of earnings and accumulations that would be his or her own property if he or she were unmarried.<sup>9</sup> Unlike pre-1975 California law, all other Texas community property is not under *H*'s management alone. Rather, it is, subject to some qualifications, under "joint management," perhaps more accurately called dual management, since consent of both spouses is supposed to be obtained for transactions concerning it.<sup>10</sup> Also, unlike pre-1975 California law, the Texas *W* does not lose all participation in management when her earnings are commingled with *H*'s. Such "mixing" in Texas means the property becomes subject to dual management.<sup>11</sup>

1, 1970, and for the most part re-enacted as sections numbered in the 5000's. Ch. 1608, [1969] Cal. Stats. 3312, 3337.

4. Former CAL. CIV. CODE § 5124.

5. See *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 20-22, 485 P.2d 529, 541-43, 95 Cal. Rptr. 329, 341-43 (1971). See also note 2 *supra*. A legislative staff report on the proposed community property bills evidenced a strong concern that *Sail'er Inn, Inc. v. Kirby* jeopardized the existing sex preferences in the community property laws. Memorandum to Senator Anthony Bielsen (on file with the author).

6. See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). But see *Kahn v. Shevin*, 416 U.S. 351 (1974), upholding discrimination against males and the granting of special tax benefits to females (widows), apparently on the theory that the statute was an appropriate means to compensate for anti-female discrimination in the job market.

7. H.R.J. Res. 208, 92nd Cong., 2d Sess. (1972).

8. TEX. FAM. CODE ch. 5, §§ 5.01-.87 (1975).

9. TEX. FAM. CODE § 5.22(a) (1975).

10. TEX. FAM. CODE §§ 5.22(b)-(c) (1975).

11. TEX. FAM. CODE § 5.22(b) (1975). Dual management is the rule whenever community property subject to management by one spouse alone under subsection (a)



The other nondiscriminatory model, which can be called "concurrent and equal," was enacted in Washington in 1971<sup>12</sup> and subsequently adopted in Arizona,<sup>13</sup> New Mexico,<sup>14</sup> and Idaho.<sup>15</sup> It is the Washington model that California generally has followed in its reform. Most transactions involving community personal property may be entered into by either spouse acting alone.<sup>16</sup> The source of the community property—*e.g.*, who earned the money—is irrelevant. This equal opportunity to manage is true of community realty, except that all conveyances and encumbrances and most leases are subject to a dual management requirement.<sup>17</sup>

The California community property reform package, built on the "equal-management" model, consists of four acts. In the first Act of the 1975 reform package, the 1973 California legislature amended numerous sections of the Civil Code, effective January 1, 1975.<sup>18</sup> The cornerstone of the California reform—after amendments made in 1974—is the following language in subsection (a) of Civil Code section 5125:

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is "mixed or combined with community property subject to the sole management, control, and disposition of the other spouse." Presumably the same rule applies when the mixing occurs with property already subject to dual management. According to Quilliam, *Gratuitous Transfers of Community Property to Third Persons*, 2 TEX. TECH. L. REV. 23, 27-30 (1970), "mixed or combined" in the Texas statute does not mean commingling to the point that the identity of deposits is lost; rather, it refers to the placing together in a common account or a common herd (of livestock). *But see* Huie, *Divided Management of Community Property in Texas*, 5 TEX. TECH. L. REV. 623, 625-26 (1974), asserting that if the spouses intend to retain individual control of the earnings of each, a "mix" that can be uncommingled by tracing the deposits should not mandate dual management.

12. See WASH. REV. CODE § 26.16.030 (1972); Cross, *Equality for Spouses in Washington Community Property Law—1972 Statutory Changes*, 48 WASH. L. REV. 527 (1973) [hereinafter cited as Cross].

13. ARIZ. REV. STAT. ANN. § 25-213 (1939), as part of a lengthy statute removing scores of discriminatory provisions in numerous chapters of the Arizona statutes.

14. New Mexico Community Property Act of 1973. See especially N.M. STAT. ANN. §§ 57-4A-7, 57-4A-8 (1973). For an excellent analysis of the 1973 revisions in New Mexico, see Bingaman, *New Mexico's "Community Property Act of 1973"—A Commentary and Quasi-Legislative History*, 5 N. MEX. L. REV. 1, 1 COMMUNITY PROP. J. 213 (1974) [hereinafter cited as Bingaman, with page citations solely to the printing of the article in 1 COMMUNITY PROP. J. 213 (1974)].

15. IDAHO CODE § 32-912 (1974).

16. CAL. CIV. CODE § 5125 (West Supp. 1975). Subsection (a) of section 5125 is quoted following text accompanying note 18 *infra*.

17. CAL. CIV. CODE § 5127 (West Supp. 1975).

18. Ch. 987, [1973] Cal. Stats. 1897 (codified in scattered sections of the California Civil Code and the California Welfare and Institutions Code).

[E]ither spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

In conformity with this equal management plan, the new law repealed or amended several additional Civil Code sections to eliminate provisions that gave *H* greater management power over community property than *W*.

California has generally adhered to the managerial system of determining liabilities for community property, under which creditors of either spouse can reach all property subject to that spouse's management and control without regard to whether the particular debt is a community or separate debt.<sup>19</sup> Accordingly, the first Act revised the Civil Code sections dealing with debt liability of community and separate property to conform with the new equal-management system. Prior to amendment in 1974, the reform legislation in the first Act made all community property liable for the postnuptial contracts of either spouse entered into after the January 1, 1975, effective date<sup>20</sup> and for the torts of the spouses.<sup>21</sup> Further provisions of the initial reform act made certain classes of community property liable for other obligations, such as child support.<sup>22</sup>

The second Act of the 1975 reform package<sup>23</sup> amended sections of the Probate Code concerning community property. The changes apply only to estates of persons dying after July 1, 1975.<sup>24</sup> Prior to 1951, if *W* died before *H*, his half of the community property was not subject to administration in the wife's estate; but if *H* died first, most of the community property was administered in his estate,<sup>25</sup> even though *W*,

19. See, e.g., *Grolemund v. Cafferata*, 17 Cal. 2d 679, 111 P.2d 641 (1942). See also older cases cited in note 392 *infra*, and ch. 1206, § 1, [1974] Cal. Stats. —, quoted in text accompanying note 121 *supra*.

20. Ch. 987, § 7, [1973] Cal. Stats. 1899.

21. CAL. CIV. CODE § 5122 (West Supp. 1975).

22. CAL. WELF. & INST'NS CODE § 17300 (West Supp. 1975). See notes 198-99 and accompanying text *infra*.

23. Ch. 11, § 9, [1974] Cal. Stats. —.

24. Ch. 1, [1975] Cal. Stats.—, enacted as an emergency measure on December 3, 1974. See Kahn & Frimmer, *Management, Probate, and Estate Planning Under California New Community Property*, 50 CAL. ST. B.J. 42, 42 (1975). Section 8 of the second Act itself (see note 23 *supra*) originally applied the reforms to estates of persons dying on or after January 1, 1975.

25. Prereform CAL. PROB. CODE § 202 (West 1956) (applicable to estates of persons dying before July 1, 1975), formerly CAL. CIV. CODE § 1402, as recodified in ch. 281, § 202, [1931] Cal. Stats. 596, provided that on *H*'s death "[c]ommunity

with respect to community property acquired after 1927, was the actual owner of a half interest in the community property.<sup>26</sup> This discrimination resulted from California's original system of male management and control of community property. Since, prior to 1951, *H* was the sole manager of all community property, it was logical to pass such control to his personal representative in order to avoid disruption of *H*'s business activities at the moment of his death. If *W* died first, however, her personal representative had no power to utilize the surviving *H*'s half of the community property to pay her debts, since she could obligate by her own contracts only her separate property. There was no need to have *H*'s half of the community property administered by *W*'s estate.

When, in 1951, *W* was given control over her own uncommingled earnings,<sup>27</sup> no amendment to the Probate Code was necessary to keep her half of such community property out of *H*'s estate when *H* predeceased her because, since 1923, the statutory language had brought into *H*'s estate only the community property "passing from the control of the husband."<sup>28</sup>

Under pre-1975 law, moreover, *W*'s appointment in her will of a personal representative other than the surviving *H* was sometimes ineffective to confer management power on the representative. Even *W*'s half of the community property did not pass to her personal representative, except to the extent necessary to carry out her will. Moreover, a surviving *H*—but not a surviving *W*—was empowered by statute to sell, lease, and otherwise manage community realty unless her devisees filed an objection.<sup>29</sup>

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property passing from the control of the husband" was subject to administration. This covered all community property except *W*'s uncommingled earnings and probably also her community property personal injury damages (although *H* had limited control over them). See former CAL. CIV. CODE § 5124; see also *Estate of Phillips*, 123 Cal. App. 2d 570, 266 P.2d 954 (1954).

26. Former CAL. CIV. CODE § 5105, enacted as § 161a by ch. 265, § 1, [1927] Cal. Stats. 484. See note 235 *infra*.

27. Former CAL. CIV. CODE § 5124, enacted as § 171c by ch. 1102, § 1, [1951] Cal. Stats. 2860, and amended by ch. 2334, § 2, [1957] Cal. Stats. 4066 and ch. 458, § 2, [1968] Cal. Stats. 1080.

28. See note 25 *supra*. The language quoted in the text appeared in an amendment enacted by ch. 18, § 2, [1923] Cal. Stats. 30.

29. Prereform CAL. PROB. CODE § 203 (West 1956) (applicable to estates of persons dying before July 1, 1975), originally part of § 1402 of the Civil Code of 1872, thereafter codified in the Probate Code by ch. 281, § 203, [1931] Cal. Stats. 596 and amended by ch. 1028, § 1, [1945] Cal. Stats. 1990.

The second Act makes the law applicable to estate administration nondiscriminatory. On death of *H* or *W*, the survivor's management powers over community property, formerly shared equally with the deceased, continue, and administration is necessary only to the extent that the deceased has devised or bequeathed community property to someone other than the surviving spouse.

The Probate Code provisions concerning community property were further revised in the third Act of the reform package.<sup>30</sup> These Probate Code changes made by the legislature also apply only to estates of persons dying on or after July 1, 1975.<sup>31</sup> Under the third Act, a surviving spouse may opt for administration of community property where such administration is not mandatory if he or she so chooses.<sup>32</sup> In addition the new law provides a confirmation procedure as an alternative to the optional formal administration. The confirmation procedure enables the surviving spouse to obtain a court decree that the property passing to him or her without administration is in fact community property and not the separate property of decedent.<sup>33</sup>

The fourth Act<sup>34</sup> of the reform package added a few new substantive provisions, such as a requirement that each spouse act in good faith when exercising management and control over community property.<sup>35</sup> However, the primary purpose of the fourth Act was to establish the extent to which the legislature intended that equal management, the most significant of the community property reforms, should operate retroactively.<sup>36</sup> In addition, the fourth Act amended the revised Civil

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30. Ch. 752, [1974] Cal. Stats. —.

31. Section 11 of the third Act, *id.*, originally applied its Probate Code reforms to estates of persons dying on or after January 1, 1975. The emergency Act of December 3, 1974 (*see note 24 supra*) changed the date to July 1.

32. CAL. PROB. CODE § 202 (West Supp. 1975) (applicable to estates of persons dying on or after July 1, 1975).

33. CAL. PROB. CODE §§ 605-59 (West Supp. 1975). The confirmation procedure and other changes made by the second and third Acts, including provisions respecting claims of creditors of the deceased spouse, are discussed in Kahn & Frimmer, *Management, Probate and Estate Planning Under California's New Community Property Laws*, 49 CAL. ST. B.J. 516, 567-75 (1974) [hereinafter cited as Kahn & Frimmer], 50 CAL. ST. B.J. 42 (1975); Meserve, Crary & Grant, *Senate Bills 570 and 1846: The Effects on Probate and Estate Planning Practice of the Recent Changes in the California Probate Code Relating to Community Property*, 50 L.A.B. BULL. 9 (1974) [hereinafter cited as Meserve, Crary & Grant]; *Review of Selected 1974 California Legislation*, 6 PAC. L.J. 125, 137-43 (1975).

34. Ch. 1206, [1974] Cal. Stats. —. Chapter 1206 amends provisions of ch. 987, [1973] Cal. Stats. 1897, which themselves became effective January 1, 1975.

35. CAL. CIV. CODE § 5125(e) (West Supp. 1975).

36. Ch. 1206, §§ 4-5, [1974] Cal. Stats. —. *See* Bonanno, *The Constitution and*

Code section 5116 to extend the benefits of broader creditors' rights to make community property applicable to pre-1975 as well as post-1974 contracts of a spouse.

Part I of this Article examines the legislature's intent concerning retroactivity of each change in the law involved in the reform package. Further, apparent conflicts arising between two sections of the fourth Act will be resolved. Section 4 specifies that the new equal-management system will be applied retroactively to pre-1975 community personal property acquisitions,<sup>37</sup> whereas section 7 provides: "This act shall not apply to or affect any act or transaction which occurred prior to January 1, 1975."<sup>38</sup>

Part II considers the constitutionality of retroactive application of the new system in each instance where the legislature appears to have intended it. It seems clear that, notwithstanding the notorious case of *Spreckels v. Spreckels*,<sup>39</sup> there is not even a colorable argument for the unconstitutionality of the legislature's mandate that *W* be given equal management powers over community property acquired after 1927 but before the reform package became effective and that *H* have equal management of pre-1975 community property previously managed by *W*. With respect to pre-1927<sup>40</sup> community property and its fruits, giving *W* equal management powers raises a difficult constitutional question in view of the old holdings that *W* had no ownership interest in such property. However, since the unconstitutional sex discrimination in the pre-1927 community property law of California compels some changes in the law, converting to the equal-management system is probably constitutional even though it may involve a technical taking of *H*'s property. Furthermore, it appears that the legislature's attempt to

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"*Liberated*" Community Property in California—Some Constitutional Issues and Problems Under the Newly Enacted Dymally Bill, 1 HAST. CONST. L.Q. 97, 98 n.6 (1974) [hereinafter cited as Bonanno].

37. Ch. 1206, § 4, [1974] Cal. Stats. —.

38. Ch. 1206, § 7, [1974] Cal. Stats. —.

39. Reference in this Article to *Spreckels*, unless otherwise indicated, is to the first *Spreckels* case, 116 Cal. 339, 48 P. 228 (1897).

40. Former CAL. CIV. CODE § 5105, enacted as § 161a by ch. 265, § 1, [1927] Cal. Stats. 484, as amended made *W* an equal owner of community property. The statute is quoted in text accompanying note 235 *infra*. It became effective July 29, 1927. Since § 161a was held not to apply to pre-enactment acquisitions (*see* text accompanying note 302 *infra*), it is possible that there is community property of marriages entered into before July 29, 1927, where, at least by statute, the wife has no ownership interest. For simplicity, this Article uses the term "pre-1927" to refer to community property acquired before July 29, 1927, and to the fruits of such property. "Post-1927" refers to property acquired on or after July 29, 1927.

broaden creditors' rights under pre-1975 contracts is constitutional, at least where "community" obligations are involved. Where the spouse owes a "separate" obligation to a pre-1975 creditor, the constitutionality of making more community property retroactively liable is questionable. However, by increasing the reimbursement rights arising in favor of the nondebtor spouse in such a situation, the basis for a finding of unconstitutionality is undercut, and the legislative intent can be upheld.

## I. THE LEGISLATURE'S SCHEME FOR RETROACTIVITY OF THE 1975 REFORM PACKAGE

### A. THE TERMINOLOGY OF RETROACTIVITY

In cases dealing with retroactivity of California community property legislation, the term retroactivity has been used by courts and commentators somewhat indiscriminately to refer to several distinct situations. It has been noted that what California law calls "retroactivity" in the context of statutes governing management and control of community property would not be viewed as presenting a retroactivity issue by most non-California judges and lawyers.<sup>41</sup> Since the precise manner of retroactive application and resulting impairment of rights or expectations is significant in dealing with the constitutional questions raised by retroactive legislation, a more discriminating lexicon is necessary to supplement the general concept of retroactivity.

Although there is considerable overlap, four general categories of retroactivity can be isolated: property-taking, transaction-overturning, transaction-regulating, and privilege- or status-regulating.

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41. This is because the *act* in violation of statute—a gift, a sale, etc.—is done after the statute's effective date. Pre-enactment law is involved only because the property that is the subject of the sale, gift, etc., was acquired before the statutory change. Yet, California courts have applied the term retroactivity to such post-enactment transactions when, in cases such as *Spreckels*, they have held application of a new law to post-enactment transactions unconstitutional because they affect property acquired before enactment. *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228 (1897).

This is not what is ordinarily considered retroactive or retrospective legislation, since it does not disturb rights which have become vested through prior transactions permissible when made. It simply changes the respective rights of husband and wife as to future control over property already acquired. This kind of "retroactivity" is much less destructive of vested rights than retroactivity as commonly understood, since it does not affect the accrued rights of third parties. It does not, for example, set aside gifts previously made by the husband without the wife's consent, a result which would follow if the legislation were completely retroactive.

Comment, *Community and Separate Property: Constitutionality of Legislation Decreasing Husband's Power of Control Over Property Already Acquired*, 27 CALIF. L. REV. 49, 54 (1938).

### 1. *Property-Taking Retroactivity*

Retroactivity in its most extreme form, especially for purposes of constitutional analysis, occurs where there is a "taking" from one person and giving to another what has traditionally been viewed as "property,"<sup>42</sup> such as money, land, or chattels. The 1927 revision of the community property laws, making *W* an equal owner of community property,<sup>43</sup> would have had this effect if the statute had been applied retroactively. Prior to 1927,<sup>44</sup> a series of California decisions<sup>45</sup> had established that *H* was the sole owner of community property and that *W* had a mere "expectancy" like an heir presumptive.<sup>46</sup> The 1927 amendment declared the spouses equal owners of community property. Thus, retroactive application of that provision would have "taken" half of *H*'s property and given it to *W*. California's initial quasi-community property legislation of 1917,<sup>47</sup> invalidated in *In re Estate of Thornton*,<sup>48</sup> was viewed as having a similar effect. Under it, when spouses moved their domicile to California from a jurisdiction having an English common law system of marital property, with coverture eliminated by statute, *W*'s earnings, which were owned by her and in which *H* had only the expectancy of an heir, would become California community property. But as just noted, before 1927 community property was owned entirely by *H* with *W* having a mere expectancy. Thus, under California's first quasi-community property laws, *W* could have her interest changed from outright ownership to a mere expectancy upon entering the state. Applying the law to property acquired before the couple came to California would be to "take the property of A and transfer it to B."<sup>49</sup>

42. Smith, *Retroactive Laws and Vested Rights*, 5 TEXAS L. REV. 231, 232 (1927) [hereinafter cited as Smith].

43. See note 40 *supra*.

44. See note 40 *supra*.

45. See notes 252-58 and accompanying text *infra*.

46. See text accompanying notes 252-53 *infra*.

47. Ch. 581, § 1, [1917] Cal. Stats. 827, amending former CAL. CIV. CODE § 164 to include in the definition of community property personalty acquired by Californians while domiciled elsewhere that would have been community property if acquired under California law. The statute was amended by ch. 360, § 1, [1923] Cal. Stats. 746 to apply to pre-enactment acquisitions.

This legislation did not use the term "quasi-community property," but the common law separate property upon which the statute purported to act was similar to that subsequently defined as quasi-community property under the statutory scheme enacted in 1961, which "converted" certain classes of English common law separate property to community property at death or divorce. See ch. 636, § 2, [1961] Cal. Stats. 1838, enacting former CAL. CIV. CODE § 140.5; CAL. CIV. CODE § 4803 (West Supp. 1975).

48. 1 Cal. 2d 1, 33 P.2d 1 (1934).

49. *Id.* at 5, 33 P.2d at 3. In the *Thornton* case the property at issue was acquired

## 2. *Transaction-Overturning Retroactivity*

Where retroactive application of a statute voids a contract or conveyance valid under pre-enactment law or validates what previously was a nullity, such an application may be termed transaction-overturning retroactivity. For example, in 1917 the legislature amended the community property laws to require *W*'s joinder with *H* in all conveyances of community realty.<sup>50</sup> To have applied this provision to conveyances of community realty made by *H* alone before its enactment could have overturned what had been a valid conveyance.<sup>51</sup> In one sense, of course, such a retroactive application of the dual-management statute could be viewed as "property-taking" retroactivity, for *H*'s vendee no longer has the land and *H* must return whatever consideration he received from the grantee. However, a forced return to the status quo ante<sup>52</sup> is usually a less serious disturbance of a person's "rights" and expectations than a naked taking of property. Moreover, section 7 of the fourth Act, precluding retroactive application of the new law to any "act or transaction,"<sup>53</sup> would seem to expressly apply, by its terms, to transaction-overturning retroactivity, while property-taking retroactivity is not dealt with on the face of the Act. Thus, distinguishing between property-taking and transaction-overturning retroactivity provides a functional distinction and facilitates the analysis of this Article.

## 3. *Transaction-Regulating Retroactivity*

Retroactive application of statutory changes in community property law taking a contractual or other relationship existing at the time of a

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before the 1923 amendment, making the 1917 Act applicable to property no matter when acquired. Hence, the court treated *Thornton* as a retroactivity case. See 1 Cal. 2d at 2, 33 P.2d at 2. In a sense, a form of retroactivity would have been involved even if property at issue had been acquired in 1924 and brought to California upon a change of domicile in 1925. Under choice of law principles and constitutional limits to extra-territorial application of law, the first chance California law had to apply to the property would have been 1925 when the change of domicile first gave California a connection with the spouses and the property. Yet the time of acquisition was prior to this "effective date."

50. Ch. 583, § 2, [1917] Cal. Stats. 829.

51. See, e.g., *Bernal v. Gliem*, 33 Cal. 668, 675 (1867).

52. The 1917 statute was construed to give *H*'s vendee such protection, at least where the grantee did not actually know of the facts making *W*'s joinder required. *Mark v. Title Guar. & Trust Co.*, 122 Cal. App. 301, 9 P.2d 839 (1932). In addition, *W* had to bring her action to rescind within a year after the grantee recorded his deed from *H*.

53. See text accompanying note 38 *supra*.



change in the law and altering some of the incidents of the relationship flowing from pre-enactment law may be termed transaction-regulating retroactivity. For example, in 1870 the legislature enacted a community property statute,<sup>54</sup> which altered the managerial system of liability of community property by providing that *W*'s earnings would not be liable for debts incurred by *H*. If at the time of enactment of that section *H* had owed money to a third party, retroactive application of the statute to pre-enactment contracts would not void the debt but would reduce the amount of community property *H*'s creditors could reach by attachment or levy of execution. Of course the limitation of a party's remedy may be so extreme as to amount to a "taking" of his or her chose in action, a form of "property." However, transaction-regulating retroactivity usually involves a much smaller impairment of pre-enactment rights and expectations than transaction-overturning and property-taking retroactivity. Thus, distinguishing these categories is useful. In addition, since transaction-regulating retroactivity always directly involves a pre-enactment "act or transaction,"<sup>55</sup> section 7 of the fourth Act is clearly addressed to such a situation, while its relevance to most instances of property-taking retroactivity is dubious. Thus, in assessing legislative intent, even the extreme case of transaction-regulating retroactivity that smacks of a "taking" should be distinguished from a "taking" case not involving an act or transaction.

#### 4. *Privilege- or Status-Regulating Retroactivity*

The fourth type of retroactive application of a statutory change does not alter any rights that stem from a private transaction or any rights that have traditionally been viewed as "property." Rather, it alters or eliminates rights that would once have been termed legislative "privileges" or "licenses"<sup>56</sup>—frequently arising out of a person's status. Due to legal tradition or the nature of the matters being regulated, no person can reasonably rely on the laws creating such rights (privileges) re-

54. Former CAL. CIV. CODE § 168, enacted by ch. 161, § 1, [1869-70] Cal. Stats. 226.

55. See text accompanying note 38 *supra*.

56. These terms at one time had almost as much magic in constitutional law as the term "vested." See text accompanying notes 216-18 *infra*. If the label "privilege" was attached to a benefit, the legislature had almost untrammelled power in bestowing and eliminating the benefit. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). The label no longer has such significance. See *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d 499, 503-04, 421 P.2d 409, 413, 55 Cal. Rptr. 401, 405 (1966). In contemporary use the terms "privilege" and "license" should signify only that the benefit is one closely regulated by the state through its police power.

maining unchanged. For example, under the California law of descent from 1864<sup>57</sup> until amendment in 1923,<sup>58</sup> when *H* predeceased *W* intestate, half of the community property passed to *W* and half to *H*'s descendants. In 1923 the law was changed to make a surviving widow the sole intestate heir of community property. This took from *H*'s children the status of heirs presumptive previously granted by the legislature but disturbed no "property" interests on which the children could reasonably have relied while their father lived.<sup>59</sup> Likewise, a legislative change with respect to grounds for divorce<sup>60</sup> merely alters regulatory provisions which the spouses, when they marry, cannot reasonably assume to be immutable and upon which they cannot have relied justifiably.

B. LEGISLATIVE INTENT WITH RESPECT TO RETROACTIVITY  
OF THE PROVISIONS OF THE COMMUNITY  
PROPERTY REFORM PACKAGE

Four acts make up the community property law reforms.<sup>61</sup> In these four acts there are numerous changes in the law in addition to the fundamental rejection of the traditional management system that discriminated against women. The legislature did not address expressly the question of retroactivity with respect to many of the changes in the law. However, considerable clues as to the probable intent of the legislature where no express position on retroactivity has been stated can be gleaned by examining why the legislature specified prospective-only application in some cases, total retroactivity in others, and for the equal-management rule itself, a mixed bag of retroactivity in some situations and prospectivity in others. It will be shown that, as a general rule

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57. Ch. 333, § 1, [1863-64] Cal. Stats. 363.

58. CAL. PROB. CODE § 201 (West 1956), *formerly* CAL. CIV. CODE § 1401, ch. 18, § 1, [1923] Cal. Stats. 29.

59. *See, e.g.*, Estate of Phillips, 203 Cal. 106, 109-10, 263 P. 1017, 1019, *cert. denied*, 278 U.S. 599 (1928).

60. *See* Annot., 23 A.L.R.3d 626 (1969) (majority rule permits new ground for divorce to apply retroactively even in cases where pre-enactment conduct is converted into basis for divorce).

61. The first Act, ch. 987, [1973] Cal. Stats. 1897, is the primary act in the reform legislation. It relates primarily to *inter vivos* management and control of community property. The fourth Act, ch. 1206, [1974] Cal. Stats. —, is the "clean-up" or "trailer" legislation designed to remedy any flaws perceived in the first Act. The second and third Acts, chs. 11 & 752, [1974] Cal. Stats. —, deal primarily with reform of the Probate Code provisions affecting community property. Reference to the numerical order of the four Acts is to their chronological order of passage. Alternatively, these Acts are sometimes referred to herein as the primary Act, the Probate Code reforms, and the clean-up Act, respectively.

of thumb, the reforms will be applied only prospectively whenever that is necessary to protect the expectations of third parties who have relied on prior law, but they will be applied retrospectively when the only expectations at stake are those of the spouses.

1. *Express Provisions on Retroactivity or Prospectivity in the First Reform Act*

Aside from the extensive revision in the third Act of the procedures for administration of the deceased spouse's estate, including the creation of a confirmation proceeding, most of the revisions in the reform package were enacted in the first Act, which consists of 21 sections, five of which expressly speak to the question of retroactivity, expressing a legislative intent for prospective-only application of the change in the law.<sup>62</sup>

a. *Profemale presumption of separate ownership*: The first Act amends Civil Code section 5110 to eliminate the presumption that when an instrument in writing conveys property to a married woman in her name she takes it as her separate property.<sup>63</sup> This presumption now applies only to acquisitions made prior to January 1, 1975. In other words, the change is prospective only.

In situations in which *W* has previously conveyed property held in her name to a vendee by instrument executed by her alone prior to 1975, it is obvious why the legislature opted for prospective application of the abolition of the presumption of her separate ownership. To restore the ordinary presumption of community ownership to *W*'s pre-1975 acquisition could upset such a conveyance and thousands like it.<sup>64</sup> Moreover, the presumption was no mere rule of evidence which *H* or his heirs could overcome by proof that community funds had been used to

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62. Ch. 987, §§ 5, 6.5, 8, 12, 15, [1973] Cal. Stats. 1898-1902. With respect to whether legislative silence on retroactivity of the other provisions of chapter 987 required prospective-only application, see text accompanying notes 110-15 *infra*.

63. The initial presumption was added by ch. 219, § 1, [1889] Cal. Stats. 328. It was not made retroactive to *W*'s pre-1889 acquisitions. See *Booker v. Castillo*, 154 Cal. 672, 98 P. 1067 (1908); *Nilson v. Sarment*, 153 Cal. 524, 96 P. 315 (1908); *Jordan v. Fay*, 98 Cal. 264, 33 P. 95 (1893).

64. A conveyance of community real property by *W* alone, unless *H* could somehow be estopped to attack it (*cf. Vierra v. Pereira*, 12 Cal. 2d 629, 86 P.2d 816 (1939); *Rice v. McCarthy*, 73 Cal. App. 655, 239 P. 56 (1925)), would have been a nullity under former CAL. CIV. CODE § 5127. Even the 1-year statute of limitations contained in this section for actions to set aside improper conveyances of community realty would have been inapplicable, because this provision applied only to conveyances by *H* alone where community property was in his name alone.

buy the property originally. Rather, the presumption was declared "conclusive" in favor of *W*'s good faith vendee.<sup>65</sup> Certainly a purchaser from *W* could reasonably rely on this language, deciding to forego investigating whether there was in fact a community source for the property. Thus the legislature plainly intended to protect from transaction-overturning retroactivity<sup>66</sup> third parties who had entered into transactions for consideration in reasonable reliance on pre-1975 law. (Of course, *W*'s post-1974 grantee acquiring pre-1975 property held by *W* in her name alone would have no basis at all to rely on the old profemale presumption except for the fact that amended section 5110 tells him he can.)

The case in favor of prospective application to protect a pre-1975 donee, legatee, or devisee of *W* by allowing such person to invoke the presumption of *W*'s separate ownership in litigation with *H* or *H*'s successor over the validity of *W*'s transfer is less convincing. The presumption of separate ownership by *W* would not be conclusive in favor of the donee, devisee, or legatee. While a donee, devisee, or legatee could, of course, rely on a decree or judgment binding *H* to the separate character of the property, how could such a party ever reasonably rely on the presumption, as long as *H* was alive and able to testify as to the community character of the property? Yet the legislature might believe that there are a few cases of donees from *W* who investigated the source of *W*'s alleged ownership, ascertained that there was no evidence either of separate or community ownership of the property, and expended funds or otherwise substantially changed their position in dealing with the property in reliance on the presumption. Since some such donees from *W* might exist, the legislature might reasonably have decided that ease of administration dictated retaining the rebuttable presumption for all of *W*'s pre-1975 donees.<sup>67</sup>

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65. See note 63 *supra*.

66. See text accompanying notes 50-53 *supra*. As pointed out in note 64 *supra*, if the presumption of separate ownership by *W* were eliminated and her grantee could not rebut the ordinary presumption of community ownership (see, e.g., *Lynam v. Vorwerk*, 13 Cal. App. 507, 110 P. 355 (1910)), any conveyance of realty by *W* alone would surely be void or voidable under CAL. CIV. CODE § 5127 (West Supp. 1975). If personal property were at issue, however, *W*'s transfer for consideration would be lawful in most instances under equal management and also under pre-1975 law if the item were her uncommingled earnings or, presumably, items purchased with such earnings. See former CAL. CIV. CODE § 5124; note 145 *infra*. Presumably, if *H* were the plaintiff suing to set aside *W*'s transfer, he would have the burden of proof to establish that the item transferred was not subject to *W*'s exclusive management. See text accompanying note 437 *infra*.

67. Avoidance of difficult problems in the administration of the law has been

On the other hand, where the ownership dispute is between *H* and *W*, it is difficult to imagine why the legislature retained the rebuttable presumption on which neither spouse could possibly rely as being more than an allocation of the burden of proof. *W* herself would know whether the property had its source in community assets or in her separate estate. If ownership was disputed and it was community property, *H* ought easily to be able to establish that fact. If the property came to *W* by gift, devise, or bequest or was purchased with separate funds,<sup>68</sup> it would be on such a fact, not the presumption, that *W* would rely. It is hard to imagine how she could change her position vis-à-vis *H* in reliance on the presumption in such a way that permitting *H* to assert community ownership would prejudice her.<sup>69</sup>

The only reason for enactment of the presumption in 1889 could have been to ameliorate the harshness of the California community property system as it existed at that time. *W* at that time had no management and control functions whatsoever with respect to community property. In fact, that concept of community property really did not then exist in California. *W* was held to have no ownership interest

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invoked as a ground for upholding denial of retroactive effect to a new rule. See, e.g., *In re Dabney*, 71 Cal. 2d 1, 452 P.2d 924, 76 Cal. Rptr. 637 (1969) (judicially altered rule of criminal procedure). Although preserving the presumption for all pre-1974 donees, devisees, and legatees of *W* may make some sense, no reason at all exists for enabling such parties in post-1974 donations to invoke the old presumption, even though pre-1975 property is involved. Section 5110 could have made elimination of the old presumption retroactive as to them before they made any change of position in reliance. Nor can I see how *W* could have changed her position in reliance prior to 1975 in a situation where she makes a gift thereafter. (The case of a post-1974 deceased *W*'s devise in a pre-1975 will is a bit more complex but unlikely to raise action in reliance deserving of protection.)

68. These are the primary sources of separate property. See CAL. CIV. CODE § 5107 (West 1970). Another source is a transmutation agreement between *H* and *W* converting community property to separate property. 12 CAL. JUR. 3d, *Community Property* § 56 (Supp. 1974). Of course, once separate property is acquired by a spouse, he or she may trace it through changes in form. See W. BROCKELBANK, *THE COMMUNITY PROPERTY LAW OF IDAHO* § 3.5.1, at 134-38 (1962).

69. Bonanno, *supra* note 36, at 109, notes that, where persons other than *H* and *W* are not affected, the 1889 presumption could constitutionally have been abrogated retroactively. New Mexico is the other American community property jurisdiction that had a profemale presumption like that in California prior to 1975. It was repealed by the New Mexico Community Property Act of 1973. As in California, this change was made prospective only by continuing the presumption for all instruments "delivered [to *W*] and accepted prior to July 1, 1973," the effective date of the New Mexico reform package. N.M. STAT. ANN. § 57-4A-6(B) (1973). Bingaman, *supra* note 14, at 227, is critical of such prospectivity where third party reliance is not involved. Professor Bingaman urges repeal of the New Mexico provision retaining the profemale presumption for prereform instruments, arguing that such a rule will create complex tracing problems in probating the estates of married women for years to come.

in such property. She had merely the expectancy of an heir.<sup>70</sup> Yet, as the Louisiana Supreme Court recently pointed out,<sup>71</sup> the very term "community" or "common" property implies some ownership participation by both spouses. The evils that the legislature of 1889 sought to correct would have been better attacked by a statute making *W* an equal owner (as was done in 1927) and giving her equal management (as was finally done in 1975). Now that both steps have been taken, no reason for retaining the presumption of separate ownership exists in most instances where it still applies. Retroactive elimination of the presumption in situations not involving third parties acting before 1975 in bona fide reliance on the presumption would have caused no hardship or unfairness.

The concept of "title" is foreign to a community property system, where ownership is determined by tracing to the source of an acquisition rather than by determining whose name is on the deed or other instrument of conveyance.<sup>72</sup> In keeping the presumption for pre-1975 acquisitions for situations not involving third parties, the legislature has thus left *W* with a mere procedural benefit and has, at the same time, eschewed privilege-regulating retroactivity. For other situations, the legislature did not hesitate to impose privilege-regulating retroactivity.<sup>73</sup> The likely explanation for prospective-only application of the amendment that eliminated the profemale presumption is simplicity—it relieves the courts of the task of determining whether in a particular case bona fide third parties are affected by the elimination of the presumption. The legislature clearly wished to avoid derogatory effects

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70. See text accompanying notes 44-46 *infra*.

71. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497, 507-10 (La. 1973).

72. See, e.g., *Tomaier v. Tomaier*, 23 Cal. 2d 754, 757-58, 146 P.2d 905, 906-07 (1944). Cf. *Merritt v. Newkirk*, 155 Wash. 517, 520-21, 285 P. 442, 444 (1930) (property held to be *W*'s separate although "title" in *H*'s name). The rule divorcing ownership of community property from English concepts of record title probably reflects the fact that since until recent years *H* was always the exclusive manager of community property, it was natural and convenient that instruments of acquisition—whether before or during marriage, whether onerous or lucrative—determined whether property was community-owned, not "record title." The same test also applied where an instrument recited *W* as the owner. See *Burdick v. Pope*, — Nev. —, 518 P.2d 146 (1974) (deed to "Mary E. Johnson Pope, a married woman" as "her sole and separate property," held: the presumption of community ownership controlled). Except where joint tenancy is involved (see, e.g., *Lovetro v. Steers*, 234 Cal. App. 2d 461, 44 Cal. Rptr. 604 (1965)), the community presumption will attach to all post-1975 acquisitions during marriage, whether in *H*'s or *W*'s name. See *Woods v. Whitney*, 42 Cal. 358 (1871) (stating the rule before enactment of the 1889 profemale presumption).

73. For example, the reform package abolished exclusive male management of pre-1975 community acquisitions in CAL. CIV. CODE §§ 5125 and 5127 (West Supp. 1975). See text accompanying notes 128-46 *infra*.

of the new laws on good faith third parties involved with *W* in pre-1975 transactions, and it may have seemed easier to the lawmakers to make the rule prospective across the board rather than to require the courts to distinguish between cases which involve third parties and those which do not. It is certainly doubtful, however, whether this purpose is sufficient to repulse a constitutional attack by *H* on the sex discrimination that continues from retaining the presumption for pre-1975 acquisitions in *W*'s name for those cases not involving rights of third parties.<sup>74</sup>

b. *The presumption of validity of deeds by one spouse:* Prior to 1975, an instrument conveying or encumbering real property, although executed only by *H*, was presumed to be valid in favor of a good faith buyer or lender without knowledge of the marriage relation.<sup>75</sup> Civil Code section 5127 has been broadened to apply to conveyances by both spouses. The new section makes the presumption, which has applied to *H*'s deeds since 1917,<sup>76</sup> applicable only to post-1974 instruments where *W* is the grantor or encumbrancer.

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74. *Reed v. Reed*, 404 U.S. 71 (1971), specifically rejects ease of administration of the law as a rational basis for statutes that discriminate on the basis of sex. Nor, with equal management made applicable to post-1975 acquisitions by CAL. CIV. CODE §§ 5125 and 5127 (West Supp. 1975) is there any special hardship on *W* that is any way remedied by bolstering her case for ownership of property in her name. See *Kahn v. Shevin*, 416 U.S. 351 (1974). If retention of the 1889 presumption for pre-1975 acquisitions where prereform third-party rights are not involved is constitutional despite *Reed*, it can only be so because the presumption provides for a logical placement of the burden of proof. If *H* caused the "title" to be placed in *W*'s name, arguably a gift by *H* is inferred. If *W* lawfully put title in her name, either the source was in fact her separate property or *W*'s pre-1975 uncommingled community earnings, arguably a rare class of community property. (Unless it is assumed that such uncommingled earnings are rare, the argument that the presumption is a logical placement of the burden of proof collapses.) Further, it must be assumed that it is a very unusual case where *W* wrongfully used pre-1975 *H*-managed money to buy items with "title" taken in her name. None of the steps in this argument is particularly strong, in my view, and the first is senseless. Why is it more likely that *H*, in putting "title" in *W*'s name, in a pre-1975 transaction involving community property, intended to give her full ownership rather than just management power? It seems probable under *Reed*, and very likely under the Equal Rights Amendment, if adopted, that retention of the 1889 profemale presumption will be held unconstitutional in cases where it is merely an evidentiary rule and no reasonable reliance interests are protected by it.

75. Former CAL. CIV. CODE § 5127. The so-called presumption is practically worthless. Even though a purchaser from *H* is in good faith in that he paid value and was unaware that his vendor was married, *W* has been allowed to "rebut" the presumption and rescind the conveyance made by *H* alone merely by proof that the realty in *H*'s name was community property (which it is presumed to be if acquired by deed during marriage) and that she did not consent to *H*'s selling it. *Mark v. Title Guar. & Trust Co.*, 122 Cal. App. 301, 9 P.2d 839 (1932). It is not the presumption of § 5127 but the short, 1-year limitation period in which the nonjoining spouse must sue to set aside a recorded deed that is of any real benefit to a bona fide purchaser.

76. Ch. 583, § 2, [1917] Cal. Stat. 829, the act which also added the requirement

Given the decision to retain in section 5110 the presumption of *W*'s separate ownership of property taken in her name under pre-1975 instruments—which is conclusive in favor of a purchaser for value—the new sex-neutral rebuttable presumption in section 5127 necessarily had to be prospective only in some respects. That is, the good faith of the purchaser from *W* that triggers the new presumption of section 5127 applicable to her conveyances can only arise if record “title” is in *W*'s name alone. Any other form of title would put the purchaser on notice that there are interests in the property—such as *H*'s community property share—that *W* cannot convey. However, at least prior to 1975, title in *W*'s name alone gave the purchaser a conclusive, not a rebuttable, presumption.

Even with section 5127's rebuttable presumption in favor of *W*'s vendee applied prospectively only, that presumption will sometimes be in conflict with section 5110's retained conclusive presumption. Thus, where *W* in 1975 conveys realty to *X* that *W* acquired in 1973 by instrument naming her alone as grantee, both section 5110 and 5127 by their terms furnish the applicable presumption—the former raising the conclusive presumption because of the state of the pre-1975 title, the latter a rebuttable presumption because of the post-1974 date of *W*'s conveyance to *X*. Because section 5110 is addressed to situations where *X*'s good faith is based on a pre-1975 instrument, it is the more specific statute and therefore should prevail. In any event, the portion of section 5127 dealing with *W*'s transfers seems to have been made prospective only not to protect a class of third parties but in an attempt to reconcile the creation of the new presumption applicable to *W*'s deeds with retention of the old conclusive presumption in section 5110 for all pre-1975 transactions involving *W*.

c. *Anti-deficiency judgment protection*: Under pre-1975 law, Civil Code section 5123 afforded a form of anti-deficiency judgment protection only for wives. *W*'s joining *H* as signatory to a note did not obligate her separate property where community property was given as security, unless she expressly assented in writing to such liability. Amended Civil Code section 5123 extends this protection to husbands as well. An instrument executed by *H* on or after January 1, 1975, does not commit *H*'s separate property unless he expressly assents in writing to such liability. This avoids transaction-regulating retroactivity

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of *W*'s joinder in conveyances by *H* of community realty. Prior to enactment of the joinder requirement there was, of course, no need for a presumption of validity of *H*'s conveyance.



that might harm third parties who could reasonably assume that a note signed by *H* prior to 1975 obligated his separate property if the community security turned out to be insufficient. Retroactive application of the new protection for *H* would merely have limited the third-party creditor's remedies under pre-enactment law. Perhaps this would not have been a serious impairment of reasonable expectations, since in most secured transactions the lender looks primarily to the security as the source of repayment. Section 5123 thus evinces a strong legislative concern that the community property reforms not cut back on third-party rights.

d. *Rights of unsecured creditors*: Under the managerial system of creditors' rights as applied by pre-1975 community property law in California, creditors on debts incurred by *H* alone could not reach *W*-managed community property (*e.g.*, her uncommingled earnings) and *W*'s creditors could not reach *H*-managed community property.<sup>77</sup> The change to equal management, while adhering to the managerial system of creditors' rights,<sup>78</sup> would have eliminated such "exemptions" of community property from liability. When the legislature first enacted equal management in the first Act, it specifically provided that elimination of these exemptions would be prospective only.<sup>79</sup> Only post-1974 creditors of a spouse could reach all the community property. If a creditor on a 1973 or 1974 contract recovered a judgment and levied execution in 1975, he would have been able to reach only property that would have been managed by the debtor-spouse before equal management.

Before it became effective, this prospectivity provision concerning contract creditors was eliminated in 1974 by the fourth Act in favor of retroactive broadening of creditors' rights. However, consideration of

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77. Exceptions to this managerial system rule included: (1) liabilities for necessities (*see* text accompanying notes 170-80 *infra*); (2) liability for *W*'s contracts during 1974 (*see* ch. 987, § 6.5, [1973] Cal. Stats. 1899); (3) liability for *W*'s antenuptial debts (*see, e.g.*, *Johnson v. Taylor*, 120 Cal. App. Supp. 771, 4 P.2d 999 (App. Dep't Super. Ct. 1931) (an erroneous decision based on the common law of coverture that the state supreme court surely would have disapproved had the issue arisen again in recent years)); and (4) liability of *W*'s earnings of which she lost management due to commingling with *H*-managed property (*Tinsley v. Bauer*, 125 Cal. App. 2d 724, 271 P.2d 116 (1954) (which could well be limited to a case of deliberate fraud on *W*'s creditors)).

78. This was generally done. *Compare* CAL. CIV. CODE §§ 5116 and 5122 (West Supp. 1975) with equal management provisions, §§ 5125 and 5127. A major exception is § 5120. Another exception concerns business assets. Under § 5125(d), *H* cannot manage *W*'s community business property, nor *W* *H*'s, but § 5116 makes such business property liable for the debts of the nonmanaging spouse.

79. Ch. 987, §§ 7-8, [1973] Cal. Stats. 1899-1900.

the legislative policy for originally specifying prospective-only application of the change in the law concerning liability may shed some light on the possible legislative attitude in 1973 as to retroactivity of numerous provisions in the first Act not expressly covered by any directive concerning prospective or retroactive application.

The prospectivity provisions that were repealed might have protected the expectations of the spouses in some situations and of creditors in others.

Example: Prior to 1975, *H* is aware that *W* is charging all kinds of expensive items and running up huge bills in circumstances where she could not be viewed as acting as *H*'s agent. Knowing that her creditors cannot reach several thousand dollars of community property he has saved from his earnings for a badly-needed remodeling of his business, *H* takes no steps to stop *W*'s debt spree.<sup>80</sup> The first Act would have protected *H* in his reliance on then-existing law.

Example: *X* had been selling items on credit to *W* for years. He knew that she was frugal and that she always carefully kept her earnings uncommingled in a separate bank account<sup>81</sup> but that *H* was a notorious spendthrift. Based on his reasonable belief that *W* would keep her earnings uncommingled so that *H*'s numerous creditors could not reach them, *X* continued in 1974<sup>82</sup> to sell to *W* on credit and did not see any need to ask for a security interest in her uncommingled savings from earnings. The first Act would have protected *X* for having acted in reliance on then-existing law.

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80. He probably could have effectively put an end to *W*'s increasing debts by advising all stores that were giving her credit that she was insolvent and that no funds subject to his management would be available to her creditors.

81. Under former CAL. CIV. CODE §§ 5124 and 5117 this meant *H* could not manage, *i.e.*, spend, *W*'s earnings; nor could *H*'s creditors, except suppliers of necessities, reach them.

82. Query the effect on reasonable reliance of enactment of a change in law well before its effective date. If a creditor closely followed legislation, he would have believed after October, 1973, that the first Act assured him his pre-1975 contracts would be governed at all times by the law in effect when made. But on September 23, 1974, he was advised by the fourth Act that post-1974 law would cover all post-1974 debt collection without regard to when the contract was made. If knowledge of such legislative action is imputed to the creditor, his case for reasonable reliance on prereform law is tenable for a debt made in December, 1973, and is nonexistent for a debt made in December, 1974. But does the rule imputing knowledge of the "law" (36 CAL. JUR. 2d *Notice* § 9 (1957)) apply to a statute prior to its effective date? If not, how should the burden of proof be placed when the creditor in a December, 1974, transaction asserts he was unaware of the fourth Act (not yet effective but already signed by the Governor) and relied on pre-reform law?

The prospectivity provisions that were deleted from the first Act disclosed a legislative intent as of September, 1973, to protect both spouses and third parties who acted in reasonable reliance on existing law and who might be harmed by transaction-regulating retroactivity. In both examples above, the basis for reliance by *H* and *X* is not especially strong. Both could have realized that the pre-1975 California community property system could at any time fall to a constitutional attack based on sex discrimination; that equal management might be established as its replacement; and that the basic principle of a managerial system of creditors' rights is that whatever a spouse may voluntarily choose to pay his or her creditors, the creditors can disgorge from the spouse. Despite this, the first Act would have protected the reliance interests of *X* and *H* in the hypotheticals above had the prospective-only provisions become effective.

## 2. *Retroactivity in the Probate Code Reforms*

As noted above, when *W* predeceased *H*, his half of the community property was not administered by her personal representative even if it was *W*-managed community property while she lived. The contrary was the rule with respect to *W*'s half interest in *H*-managed property when he predeceased her.

Amended section 202 of the Probate Code makes the law non-discriminatory, and administration by decedent's personal representative is mandatory only for such amount of decedent's half of the community property as he or she bequeaths or devises to one other than the surviving spouse.<sup>83</sup> Section 203 was also amended to limit the

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83. Amended CAL. PROB. CODE § 202(a) (West Supp. 1975). Section 202(b) provides: "Notwithstanding subdivision (a), a surviving spouse may file a petition for probate of the will or for administration of the estate of the deceased spouse . . . ." The benefits of so electing administration are discussed in Meserve, Clary & Grant, *supra* note 33.

In addition, administration is required by CAL. PROB. CODE § 204 (West Supp. 1975) if community property is bequeathed or devised in trust for the surviving spouse.

Perhaps new § 202 will cause the courts to overrule the cases presuming that property taken by an instrument reciting joint tenancy title is separately owned by the spouses even though purchased with community funds. As observed in note 72 *supra*, the California joint tenancy cases are contrary to basic principles of community property that ownership is determined by the time and manner of acquisition, not "record title," and that community ownership of acquisitions during marriage is presumed until a separate source or an actual agreement between the spouses to the contrary is proven. *In re Trimble's Estate*, 57 N.M. 51, 253 P.2d 805 (1953), offers a good analysis of how California's treatment of joint tenancy deeds has departed from community property principles. Assuming California's cases preferring joint tenancy to community ownership reflect a policy of upholding what the courts may believe to be a desire to avoid

powers of the surviving spouse to deal with community realty subject to administration and to confer those limited powers on a surviving *W* as well as *H*.<sup>84</sup> There are procedural changes regarding creditors' remedies and a new confirmation proceeding in lieu of administration.<sup>85</sup>

The third Act added Probate Code section 205, which seems to deprive the surviving spouse of his or her right under pre-enactment case law to have separate debts<sup>86</sup> paid by the administrator from the decedent's separate property or to have a credit to the community from decedent's separate property if community funds are used to pay the separate debt. Such a right by the surviving spouse under pre-1975 law seems inherent in *Weinberg v. Weinberg*,<sup>87</sup> where the court in a divorce case awarded *W* a credit due to *H*'s having used community property during marriage to pay his separate debts—alimony and child support obligations arising out of a prior marriage.<sup>88</sup>

While *Weinberg* did not expressly overrule older cases holding that at death a decedent's debts should be paid pro rata from community and his separate property,<sup>89</sup> logic compels that result. The court reasoned that debts not benefiting the community should be charged ultimately to the debtor's property; otherwise, the debtor could take unfair advantage of his or her spouse.<sup>90</sup> The *Weinberg* rule is probably

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probate (see generally Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87 (1961)), the Probate Code amendments may eliminate the reasons for departing from the ordinary presumption of community ownership. See also Kahn & Frimmer, *supra* note 33, at 569-70.

84. CAL. PROB. CODE § 203 (West Supp. 1975) (effective July 1, 1975). The surviving spouse may begin to deal with community realty subject to administration 40 days after the death of decedent spouse where a devisee does not file an objection only "if the record title stands in the name of the surviving spouse or the surviving spouse and any other person other than the deceased spouse . . . ."

85. CAL. CIV. PRO. CODE § 353.5 (West Supp. 1975); CAL. PROB. CODE §§ 650-59, 1240 (West Supp. 1975).

86. The theory of distinguishing community and separate debts has been most extensively developed in Washington and Arizona, where even prior to dissolution of marriage the "separate" creditor of a spouse cannot reach community property. See, e.g., *Babcock v. Tam*, 156 F.2d 116 (9th Cir. 1946) (Arizona law); *Aichlmayr v. Lynch*, 6 Wash. App. 434, 493 P.2d 1026 (1972). The theory seems to be applied in all community property states except California upon dissolution of the community. See, e.g., *Gouaux v. Gouaux*, 211 So. 2d 97 (La. Ct. App. 1968); Idaho Code § 15-3-902(c) (1974).

87. 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967).

88. See note 404 *infra*, criticizing *Weinberg* for making the credit awarded to *W* there less broad than the reasoning of the case mandated.

89. See, e.g., *Sieroty v. Silver*, 58 Cal. 2d 799, 803-04, 376 P.2d 563, 566-67, 26 Cal. Rptr. 635, 648 (1962).

90. 67 Cal. 2d at 563-64, 423 P.2d at 712, 63 Cal. Rptr. at 16. During marriage, the creditor himself is not affected by these equities and can reach all nonexempt prop-

applicable to payment of debts during administration because there is no basis in the *Weinberg* reasoning for distinguishing debts paid during marriage and settled upon divorce in that case and debts arising during marriage and administered after death.

Section 205(a), however, seems to abrogate *Weinberg* with respect to a spouse's debts unpaid at his or her death by allocating the payment of debts proportionately between the surviving spouse's interest in community property and the decedent's interest in community and separate property subject to administration.<sup>91</sup> This statute, together with *Weinberg*, creates a bizarre situation upon dissolution of the community by death. With respect to decedent's separate debts already paid with community funds, a claim for reimbursement can be asserted by the survivor. But where such separate debts are outstanding at death, community funds will be used in part to pay them; there will be no reimbursement to the community; and separate property not subject to administration apparently will escape being considered in ascertaining the pro rata share to be charged to the separate estate. This may amount to an unconstitutional taking of the surviving spouse's property insofar as the survivor's half of community funds acquired before July 1, 1975, is applied to decedent's separate debt without giving a right of reimbursement.<sup>92</sup>

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erty managed by the debtor spouse without regard to whether the debt is "separate" or "community." *Id.* at 562-63, 432 P.2d at 711, 63 Cal. Rptr. at 15.

91. CAL. PROB. CODE § 205(a) (West Supp. 1975) (effective July 1, 1975), which provides in part:

In the absence of an order allocating the debts under Section 656, the debts shall be chargeable proportionately against (1) the interest of the surviving spouse in the community property and (2) the interest of the deceased spouse in the community property passing without administration and the interest of the deceased spouse in any separate property, community property, and quasi-community property which is subject to administration.

92. Suppose a portion of *W*'s half interest in community property acquired in 1973 by *H* is taken to pay *H*'s separate debt (e.g., alimony owed a prior wife). Under former CAL. CIV. CODE § 5105, *W* was an equal owner of that community property—she had a half interest—whether or not she was the manager of it. Under *Weinberg*, when *H* used *W*'s share of the community property to pay *H*'s separate debt, *W*'s proprietary rights were not lost; there was only a change of form from an interest in money to a chose in action for reimbursement, which is also a form of property. A similar change of form occurs when *H* loans community money and the community gets a cause of action for repayment against the borrower. If no reimbursement claim arises when *H* pays a separate debt with community funds, *W*'s property is simply taken from her. See *McDonald v. Senn*, 53 N.M. 198, 204 P.2d 990 (1949), where the court, writing prior to *Weinberg* and failing to predict that California would award reimbursement in the *Weinberg* fact situation, declared that because of *H*'s power to pay his separate debts with community money, a California *W* did not have a vested, equal ownership interest in community property, notwithstanding the 1927 legislation stating that she did.

CAL. PROB. CODE § 205 (West Supp. 1975) takes *W*'s property to the extent that

Absurdities are compounded if the surviving spouse's *Weinberg*-based reimbursement claim based on decedent's separate debts paid by community funds before dissolution of the community must itself be discharged under the rules of section 205. This would mean a portion of the survivor's claim would be paid with the survivor's own share of the community property. It seems clear from *Weinberg*, however, that the community's reimbursement claim there recognized is not a debt for which the community property liability provisions of the Civil Code<sup>93</sup> make the community liable. On the contrary, the *Weinberg* reimbursement claim is recognized to compensate for the unfairness that the liability provisions of the Civil Code authorize in making community property liable for the debtor spouse's separate debt. Thus, since Probate Code section 205 appears to treat only debts covered by the liability provisions of the Civil Code, the surviving spouse's reimbursement claim based on inter vivos payment by the decedent of separate debts with community funds should be payable solely from decedent's separate property and decedent's half of the community property, notwithstanding section 205.

The third Act also amends three provisions of the Financial Code relating in part to devolution of property at death and also, apparently, to management and control during marriage.<sup>94</sup> Financial Code section 851 now provides:

A bank account by or in the name of a married person shall be held for the exclusive right and benefit of the person, shall be free from the control or lien of any other person except a creditor, and shall be paid to the person or to the order of the person, and payment so made is a valid and sufficient release and discharge to the bank for the deposit or any part thereof.

The statutory protection before this change in the law extended only to a "married woman," apparently on the theory that case law protected *H*. Financial Code section 7601 has been similarly amended to make

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her share of the community property must be applied to pay a pro rata portion of *H*'s separate debts. When this occurs, *W* receives nothing directly in return. Despite such a "taking," § 205 may not be unconstitutional, for it does give *W* some "compensation." If *W* dies first, her personal representative can now "raid" *H*'s interest in the community property by applying it to pay part of *W*'s separate debts while giving no reimbursement. Even if this "trade-off" saves § 205(a) from a finding of unconstitutionality when applied to pre-1975 community acquisitions, the mandated procedure is not at all fair to the surviving spouse. Section 205(a) should be repealed.

93. See generally CAL. CIV. CODE §§ 5100-38 (West 1970). See also note 91 *supra*.

94. CAL. FIN. CODE §§ 851, 7601, 11200 (West Supp. 1975).

it sex-neutral with respect to shares and investment certificates of savings and loan associations, and section 11200 has been amended with respect to federal savings and loan shares. The latter statute protects minors as well as "married persons."

If these sections of the Financial Code were intended to be merely for the benefit of the financial institutions and to have no effect on the community property law principles as they apply between *H* and *W*, the sex-neutralizing amendments would have little significance to the subject matter of this Article. Although it has been held that what is now Financial Code section 7601 did not convert funds deposited by a married woman in a savings and loan association from community to separate property,<sup>95</sup> there is dictum to the effect that the statute did permit a married woman to do acts she otherwise could not.<sup>96</sup> Similar dictum exists concerning Financial Code section 11200.<sup>97</sup> It is quite likely, then, that the legislature intended bank and savings and loan deposits of community funds to be outside the equal management system of the reform package.

Legislative intent is muddled, however, by the retroactivity provision apparently intended to apply to all parts of the third Act. Almost identical to a provision of the second Act,<sup>98</sup> it states: "This act shall apply to the estates of persons dying on or after July 1, 1975."<sup>99</sup> This means either that the Financial Code sections were thought by the legislature to have nothing to do with management and control inter vivos but rather concerned the will substitute of a pay-on-death account or that there simply is no express retroactivity or prospectivity provision for the sex-neutralizing amendments of the Financial Code sections insofar as they apply other than in estate administration.<sup>100</sup> The latter interpretation seems more likely.

In any event, it is clear that for the most part the Probate Code provisions are prospective only. One exception is the partial abroga-

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95. *Rowe v. Hibernia Sav. & Loan Soc'y*, 134 Cal. 403, 66 P. 569 (1901).

96. *Id.*

97. *Wikes v. Smith*, 465 F.2d 1142 (9th Cir. 1972). The statement is dictum because the court holds that before *W*'s deposit in the federal savings and loan association she and *H* had transmuted property from community to separate.

98. See notes 23-24 *supra* and accompanying text.

99. In the original text of the third Act, the date was January 1, 1975. The date was changed to July 1 by the emergency Act of December 3, 1974. See note 31 *supra*.

100. The third Act's prospectivity clause (see text accompanying note 98 *supra*), probably applies where the Financial Code provisions are invoked with respect to pay-on-death accounts, a subject related to estate administration. The Financial Code amendments in the third Act became effective on January 1, 1975. Letter from Bion M. Gregory, Chief Counsel, Senate Committee on Judiciary (on file with the author).

tion of *Weinberg* by the new Probate Code section 205(a). Despite the quoted prospective-only language in the third Act, the debt liability rules of section 205 will apply to community property acquired and debts incurred before July, 1975.

One reason for the generally prospective application of the Probate Code reforms is that retroactivity here would in some circumstances overturn transactions undertaken in reliance on prior law. For example, dealings before July, 1975, by *H*'s personal representative affecting all the community property would be voided by a holding now that actually the personal representative of deceased *H* did not, in view of the Probate Code reforms, ever have control of *W*'s half of the community property. On the same theory, complete retroactivity of these reforms could result in the personal representative receiving no remuneration for having taken care of half or more of the community property prior to July, 1975.

On the other hand, there undoubtedly will be numerous situations where little, if any, reason appears for refusing to apply the Probate Code reforms to estates of spouses dying before July, 1975. For example, suppose *H* died in March, 1975, with a will leaving all his property to *W* but appointing *A*, his financial advisor, as executor. The estate consists of securities and realty, all of which was *H*-managed community property. *A* qualifies as executor and begins management of the properties pending distribution. On July 1, 1975, *W* wishes to raise the rents on some of the apartment units in *H*'s estate, but *A* considers this unwise. Why should not *W* be empowered as of July 1, 1975, to have administration of this estate terminated under the policies of the Probate Code reform in favor of abolishing needless administration proceedings? *A* could be compensated fairly for services already rendered and *W* held bound by any contracts *A* had lawfully made before July, 1975. It is most unlikely that *A* would have changed his position in reliance on his being able to continue as executor. True, *H*'s expectation that *A* would manage the estate until distribution would be dashed, but that could have occurred for any number of reasons—*A* could have failed to qualify as executor, died shortly after *H*, etc. And since *H* did not create a testamentary trust,<sup>101</sup> he certainly understood that *W* would come into management power sooner or later.

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101. If *H* had created a testamentary trust, retroactivity of the Probate Code reforms would not enable *W* to terminate administration. CAL. PROB. CODE § 204 (West Supp. 1975) (effective July 1, 1975).



If the legislature actually considered such matters, its decision to make the Probate Code reforms prospective only evidences (1) an intent to protect highly conjectural reliance on prior law by a spouse (*e.g.*, in the hypothetical above, the possibility that *H* would have created a testamentary trust, had he anticipated the change in the law, in order to make sure *W* would not retain control on *H*'s death of property subject to equal management or obtain control of *H*'s community property business subject to his sole management) or (2) a legislative conclusion that a uniform rule easy to administer is desirable, even though it will deprive the surviving spouse of the benefits of the new law in some instances without any justification.

The prospective-only provision of the Probate Code reforms means that a constitutional challenge of the discriminatory prereform law can still be made against estates of husbands dying before July, 1975, that are still undergoing administration.<sup>102</sup> In view of the United States Supreme Court decision in *Reed v. Reed*,<sup>103</sup> which invalidated

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102. The decision of the legislature (*see* notes 24 and 31 *supra*) to postpone for 6 months the effective date of the Probate Code reforms apparently has the effect of making California law of estate administration of community property even more discriminatory in the first half of 1975 than it was prior to 1975. Before 1975, *W*'s personal representative could obtain control over community property only to the extent necessary to carry out *W*'s will. The representative could not get control of *H*'s half interest. *H*'s estate, on the other hand, administered all community property "passing from the control of the husband" at his death. CAL. PROB. CODE § 202 (West 1956). Under former CAL. CIV. CODE § 5124, *W*'s half interest in *W*'s uncommingled earnings and personal injury damages could not be seized by *H*'s personal representative. It did not pass from *H*'s control, and, of course, *H* could not bequeath or devise it. Now, however, under equal management during the first half of 1975, such earnings and community property personal injury damages of *W* do pass from *H*'s control at his death in the sense that *H*'s equal management ends. *See* CAL. CIV. CODE § 5125 (West Supp. 1975). Only *W*'s community business in which *H* does not participate (CAL. CIV. CODE § 5125(d)) will not pass from *H*'s equal control at his death. Since far more married women have uncommingled earnings than have an actual business which they operate, the combination of equal management plus retention of the prereform CAL. PROB. CODE § 202 increases the sex discrimination of the decedents' estates law during January-July 1975 and for as long thereafter as the estates of pre-July decedents are undergoing administration.

103. 404 U.S. 71 (1971). To attempt to uphold the discrimination on the ground that *W* could not have had experience as a manager because of the male-management aspects of the prereform system is obviously unacceptable bootstrapping, because the system as it applied to the spouses while they both lived was also suspect due to discrimination. Moreover, since 1917, *W* had participated in all sales and encumbrances of community realty, albeit through a veto rather than a managerial power, and prereform CAL. PROB. CODE § 203 concerned only community real property.

In addition, of course, *W* had, since 1951, management of her own uncommingled earnings. The realty at issue might have been purchased by her with such funds and even been integrated into her business. Yet if she were the surviving spouse, CAL. PROB.

under the fourteenth amendment sexually discriminatory provisions of Idaho probate law, there appears to be no basis even for arguing that section 203 prior to amendment is valid. The only conceivable reason why, under prereform law, *W* did not have the same management rights as surviving spouse<sup>104</sup> would be a legislative conclusion that women are as a rule not as adept at managing property as men. This was one ground given by the Idaho Supreme Court in *Reed*<sup>105</sup> to uphold the discriminatory statute at issue there, but it did not impress the Court. Thus, notwithstanding the provision that the amendment to section 203 should apply only to estates of persons dying after June, 1975, the change in the law giving extraordinary management powers to either *H* or *W* may have to be retroactively applied.

The prereform rule permitting *H*'s half interest in *W*-managed property to escape administration at her death but requiring administration of her half interest in *H*-managed community property at his death also must fall under *Reed*. This will not, however, require retroactive application of new Probate Code section 202 and new section 204, the provisions which broadly eliminate the requirement of administration. Since the legislature indicated in the Probate Code reforms that it did not wish these probate shortcuts to apply retroactively, a court might cure the constitutional defect by holding that all *W*-managed community property is subject to administration in estates of wives dying before July 1, 1975.<sup>106</sup> In addition, that portion of prereform

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CODE § 203 gave her no extraordinary powers, while, even in that circumstance, § 203 conferred them on *H*.

104. Prereform CAL. PROB. CODE § 203 (West 1956).

105. See *Reed v. Reed*, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970). "In *Reed*, the assumption underlying the Idaho statute was that men would generally be better estate administrators than women." *Schlesinger v. Ballard*, 95 S. Ct. 572, 577 (1975).

106. Of course, where *W* died before 1975 this would not be a complete cure of the problem because the underlying pre-1975 statutes that created the class of *W*-managed property were themselves discriminatory. Even if the concept of the wife's "earnings" (see former CAL. CIV. CODE § 5124) were to be broadly interpreted to include every item of community property that would have been *W*'s own property if unmarried, former § 5124 eliminated *W*'s management power in the case of commingling of such earnings with *H*-managed property. But commingling did not reduce *H*'s management powers. Arguably, the commingling referred to in § 5124, by which *W* lost management, was a deliberate commingling by her, a waiver of her rights. But the same waiver by *H* of his management power would apparently not be found if *H* did the commingling.

In my opinion, the California courts cannot apply the discriminatory pre-1975 management and control laws to determine what property is subject to administration in estates of spouses dying before January 1, 1975, especially since sex is a suspect classification in this state. See note 5 *supra*. The least radical "cure" is to construe *W*'s "earnings" to mean all community property that would have been her own property if unmar-

section 202 retaining, pending administration, management power of a surviving *H* but not a surviving *W* would have to be made sex-neutral.

### 3. *Retroactivity and Prospectivity Provisions in the Fourth Act*

The sponsors of equal management in the 1973 California legislature that enacted the first Act were undoubtedly aware that prospective-only application of the reform—in the sense of applying it only to post-1974 community property and fruits thereof—would have frustrated one of their most important goals, assuring credit opportunities for women. Apparently, however, draftsmen of the original reform bills deliberately refrained from providing for retroactivity. Perhaps the sponsors felt that the state courts after *Addison v. Addison*<sup>107</sup> would have little difficulty in holding the new equal management system retroactive without any supportive legislative findings with respect to the need for uniformly applying the equal-management reform to all community property. Perhaps they simply did not want to distract their legislative colleagues from the substantive reform issues.

On the other hand, the purposes of the reform legislation would not have been achieved had equal management not applied retroactively to prereform acquisitions. In many cases, the community wealth upon which a credit-vendor would probably rely in giving credit to a *W* would be pre-1975 savings and investments. If the first Act did not apply retroactively,<sup>108</sup> commercial establishments could confidently give

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ried and to hold that when commingling of *W*-managed and *H*-managed property occurred, whichever spouse caused the commingling lost management power. If the latter determination could not be made, dual management would result, as under TEX. FAM. CODE §§ 5.22(b)-(c) (1975); and for purposes of determining what property was subject to administration, *W* would be considered the manager if she died first, *H* if he died first. The result would be a separate-but-equal management scheme.

107. 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965). *Addison* held that application of a quasi-community property statute to property acquired in a common law state prior to enactment of the statute was constitutional. See text accompanying notes 339-43 *infra*. See Comment, *Equal Management and Control Under Senate Bill 659: "To Have and to Hold" Takes on New Meaning in California*, 11 SAN DIEGO L. REV. 999, 1000-01 n.12 (1974) [hereinafter cited as Comment].

108. It is clear from the announcements of Senator (now Lieutenant Governor) Dymally, one of the chief proponents of the reform, upon enactment of the first Act, that he believed equal management would apply to pre-1975 community acquisitions. Wives with no earnings of their own would now be able to obtain credit as individuals, not just as agents of their husbands, Dymally stated, since the Act gave the wife equal management and hence equal power to obligate "all the community property owned by her and her husband." Press Releases, dated Oct. 2 and Oct. 5, 1973 (on file with the author). Had the Act been applied prospectively only, it would certainly not have "remove[d] the last legal reason for discriminating against women in the area of credit," as Dymally said it would.

credit, in reliance on its provisions, only to *W*'s of a marriage solemnized after 1974.<sup>109</sup>

Despite the apparent intent of legislators, there was no assurance that the courts would hold that the legislature had sufficiently *manifested* an intention that the equal-management feature of the first Act should apply retroactively to pre-1975 acquisitions.<sup>110</sup> The general rule of construction is said to be that unless the intent to make the statute retroactive "clearly appears from the act itself," a statute will not be construed to operate retroactively.<sup>111</sup> Civil Code section 3 also had to be reckoned with: "No part of . . . [this Code] is retroactive unless expressly so declared." Although it is said such a statute is merely a rule of construction,<sup>112</sup> there are numerous cases to support the Cali-

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109. Prior to 1974, former CAL. CIV. CODE § 5116 provided that only that community property earned by *W* was liable for contracts entered into by *W*. (Section 5116 as it applied during 1974 is discussed in text accompanying note 474 *infra*.) In 1973 the legislature enacted CAL. CIV. CODE §§ 1812.30 and 1812.31 (West Supp. 1975), reflecting California's managerial system of community property liability in requiring that credit be extended to married women:

No married woman shall be denied credit in her own name if her uncommingled earnings or separate property are such that a man possessing the same amount of property or earnings would receive credit.

CAL. CIV. CODE § 1812.30(a) (West Supp. 1975).

Since whether *W*'s earnings are commingled or uncommingled is now wholly irrelevant to creditors' rights under CAL. CIV. CODE § 5116 (West Supp. 1975), it is urgent that § 1812.30 be amended or repealed. *See* Comment, *supra* note 107, at 1010-11.

If the 1975 reforms were not retroactive to pre-1975 community property, some wives would receive no benefit at all from equal management and the power to obligate by contract all the community property—*e.g.*, where the couple is retired and lives solely off the fruits of pre-1975 investments, pensions, etc. *See* *Boyd v. Oser*, 23 Cal. 2d 613, 145 P.2d 312 (1944), discussed in text accompanying note 252, *infra*. Even where the husband was working in 1975 and earning post-1974 community property subject to the new Act, a seller asked to give credit to *W* might fear that the current earnings would be consumed by day-to-day expenses and that if *W* defaulted the available community property would consist of pre-1975 savings and investments, which *W* could not bind by her contract. Thus, if amended §§ 5125 and 5116 did not apply to pre-1975 community property, a seller giving credit to *W* could be sure of reaching all the community property only if the couple had married after 1974. Even then, of course, the seller faced the risk of dealing with the wife of a "separate property marriage." *See* Bodenheim, *The Community Without Community Property: The Need for Legislative Attention to Separate-Property Marriages Under Community Property Law*, 8 CAL. WESTERN L. REV. 381 (1972).

110. This was especially true because, while the bill that became the first Act was going through legislative revision, an amendment was added at one point, only to be eliminated later, specifically stating that the reform applied to pre-enactment property. S.B. 569, 1973 Legislature, as amended in Senate April 2, 1973.

111. 45 CAL. JUR. 2d *Statutes* § 26 (1958) *citing, inter alia, In re Estate of Frees*, 187 Cal. 150, 201 P. 112 (1921).

112. *See, e.g., In re Estrada*, 63 Cal. 2d 740, 746, 408 P.2d 948, 952, 48 Cal. Rptr. 172, 176 (1965).

California Attorney General's conclusion that the rule of construction against retroactivity is "strict."<sup>113</sup> There was even one decision not long ago by the California Supreme Court announcing that legislative documents such as an assembly subcommittee report could not be referred to in determining whether the legislature intended a statute to apply retroactively: the intent had to appear on the face of the act.<sup>114</sup> The rule of construction in favor of prospective-only application of a new statute or amendment had been applied to California's original quasi-community property legislation, enacted in 1917,<sup>115</sup> which sought to convert common law marital property into community property when a couple moved to California.<sup>116</sup> Since the first Act was silent as to any intent to apply the changes in the law retroactively—as noted, the only expressed intent was for prospective operation of five sections of the Act—it would also run up against the rule of construction that when there is substantial doubt of the constitutionality of an act under one of two tenable interpretations, that construction will be adopted which avoids the serious constitutional question.<sup>117</sup>

Thus, some 4 months after the first Act was signed by the Governor and about a year before its effective date, there was good reason for the sponsors to move on a bill to state specifically the legislature's position on retroactivity of the equal-management reform. This was the primary purpose of the "clean-up" or "trailer" bill in the 1973-74 legislature.<sup>118</sup> As drafted in June, 1974, the clean-up bill provided

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113. 30 OP. CAL. ATT'Y GEN. 130, 134 (1957).

114. *DiGenova v. State Bd. of Educ.*, 57 Cal. 2d 167, 367 P.2d 865, 18 Cal. Rptr. 369 (1962). By comparing this case with the language of *In re Estrada*, 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965), one can find support for a strong or weak presumption to enable the court to reach the desired result. More recently, the courts seem properly not to rely on the presumption of prospectivity alone in determining the retroactive effect of a statute, choosing instead to analyze as well the policies pro and con and the likely legislative intent when an act is silent as to prospective or retroactive application. See, e.g., *Harrison v. Workmen's Compensation Appeals Bd.*, 44 Cal. App. 3d 197, 118 Cal. Rptr. 508 (1974); *Gordon H. Ball, Inc. v. State*, 26 Cal. App. 3d 162, 102 Cal. Rptr. 637 (1972). See also *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 595, 97 Cal. Rptr. 30, 38 (1971). *Contra*, *In re Marriage of Bouquet*, 44 Cal. App. 3d 679, 119 Cal. Rptr. 67 (1975), *hearing granted*, No. 75-46 (Cal. Mar. 17, 1975).

115. See note 47 *supra*.

116. *In re Estate of Frees*, 187 Cal. 150, 201 P. 112 (1921). See also *In re Estate of Arms*, 186 Cal. 554, 119 P. 1053 (1921). Subsequently the legislature expressly provided for retroactive application of the law, and this was held unconstitutional in *In re Estate of Thornton*, 1 Cal. 2d 1, 33 P.2d 1 (1934).

117. See *United States v. Harriss*, 347 U.S. 612, 618 n.6 (1954); *South Utah Mines & Smelters v. Beaver County*, 262 U.S. 325, 331 (1923).

118. Ch. 1206, [1974] Cal. Stats. —. See *Bonnano*, *supra* note 36, at 98 n.6; *Comment*, *supra* note 107, at 1000-01 n.12.

that equal management would be the general rule (subject, of course, to the dual-management requirement for sales of realty, household furnishings, etc.) with respect to all community property "whether acquired prior to or on or after January 1, 1975."<sup>119</sup> In addition, Civil Code section 5116 would be amended to make community property liable for contracts of either spouse made during marriage "*and prior to or on or after January 1, 1975.*"<sup>120</sup>

Some assemblymen must have doubted whether the courts would uphold these express retroactivity provisions as constitutional, for the next amendments to the clean-up bill added a sort of preamble stating legislative policies and making findings of fact for the obvious purpose of bolstering the case for constitutionality of the retroactivity provisions:

The Legislature finds and declares that (1) the extension of the right to manage and control all of the community property of a marriage to both spouses entails important social and economic considerations, (2) the right to manage and control community property is not a fundamental right which may not be divested by the Legislature and is not accorded the same status as the rights of the spouses in community property during marriage which are, and remain, present, existing, and equal, and (3) the application of the right to manage and control community property to all community property of a marriage, whether acquired before or after January 1, 1975, is necessary to achieve social and economic equality and facilitate commercial transactions.

The Legislature further finds and declares that (1) the liability of community property for the debts of the spouses has been coextensive with the right to manage and control community property and should remain so, (2) the extension of the liability of community property for obligations contracted prior to January 1, 1975, does not impair the rights of creditors or the interests of the spouses in the community property, and (3) the extension of the liability of community property avoids undesirable preferences among creditors of the community.<sup>121</sup>

Section 7 of the clean-up bill is the kicker that causes most of the problems in determining legislative intent: "This act shall not apply to or affect any act or transaction which occurred prior to January 1, 1975."<sup>122</sup> With this final amendment, both houses passed the clean-

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119. This is the language ultimately utilized in CAL. CIV. CODE §§ 5125 and 5127 (West Supp. 1975).

120. CAL. CIV. CODE § 5116 (West Supp. 1975).

121. Ch. 1206, § 1, [1974] Cal. Stats. —.

122. Ch. 1206, § 7, [1974] Cal. Stats. —.

up bill, and it was signed into law as the fourth Act.<sup>123</sup> With respect to retroactivity and prospectivity it consisted of the original Senate provisions making the revised Civil Code section 5116 retroactive to pre-1975 contracts and providing that equal management of community personal property<sup>124</sup> and real property<sup>125</sup> (except in dual-management situations) should be the rule even as to community property acquired before 1975. It also included the above-quoted statement of legislative policy on behalf of retroactive application of some reform provisions and section 7, also quoted above, that was the final amendment to the bill.

In view of the legislative policies articulated at the beginning of the fourth Act, section 7 is surprising. It is also ambiguous in several respects. First, consider the meaning of "[t]his Act." Does this language mean only the fourth Act, or does it also refer to the primary act of the reform, which the fourth Act "trailed" and "cleaned up"? If it only applies to the clean-up legislation, several substantive provisions in the reform that are not referred to in the clean-up bill may be given retroactive effect by the courts without the need to construe section 7 of the fourth Act.<sup>126</sup> Notwithstanding the words, "[t]his Act" in section 7, it is reasonable to infer that the legislature meant to declare a policy against certain types of retroactivity with respect to the entire community property reform so that section 7 should be construed to refer not just to the clean-up Act but to the first Act as well. Section 7 appears to state a policy of the legislature as to retroactivity of community property amendments generally. There seems to be no reason why legislative concern for protecting acts and transactions that might be affected by retroactive application of substantive provisions referred to in the clean-up Act would not be equally addressed to acts and transactions that could be affected by other reform changes appearing only in the primary legislation.

The next ambiguity of section 7 arises out of the word "affect." What does it mean when it prohibits retroactive application that will "affect" any pre-1975 act or transaction? "Affect" is a broad term, and section 7 seems on its face to bar transaction-regulating retroactivity as well as transaction-overturning. But so construed, section 7 conflicts with section 2 of the clean-up Act, which amends Civil Code

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123. Ch. 1206, [1974] Cal. Stats. —.

124. CAL. CIV. CODE § 5125 (West Supp. 1975).

125. CAL. CIV. CODE § 5127 (West Supp. 1975).

126. See text accompanying notes 160-199 *infra*.

section 5116 to provide: "The property of the community is liable for the contracts of either spouse which are made after marriage and prior to or on or after January 1, 1975." This plainly calls for transaction-regulating retroactivity for the new rule concerning liability of community property. Although a spouse's contract made before 1975 is not voided by the new rule, amended section 5116 restructures the contract by broadening the creditor's remedies for breach. When the pre-1975 debt was incurred, *W*'s uncommingled community earnings were immune from liability for *H*'s contracts, and *H*-managed community property was exempt from liability on *W*'s contracts.<sup>127</sup> Certainly, to strip away these immunities on a debt incurred before 1975 is to "affect any act or transaction which occurred prior to January 1, 1975." One solution is for the courts to find sections 2 and 7 of the clean-up Act to be in direct and irreconcilable conflict because they direct different treatment of pre-1975 contracts and resolve the conflict by holding that the more specific provision, section 2, prevails over the more general section 7. Or the courts could break the impasse by construing the term "affect" in section 7 narrowly so that it would not conflict with section 2. That is, section 7 could be interpreted to bar only transaction-overturning retroactivity, since clearly section 2 calls for transaction-regulating retroactivity.

The courts probably will not narrowly construe section 7 but will concede it to be in direct conflict with section 2 and hold that section 2 prevails with respect to retroactivity of Civil Code section 5116. To narrowly construe section 7 would be improper because section 7 seems to be addressed to retroactivity questions other than those relating to creditors' rights, where, in fact, transaction-regulating retroactivity was intended to be barred. Section 7 was probably added to qualify Civil Code sections 5125(a) and 5127, both amended by the clean-up Act, which provide that equal management shall apply to pre-1975 community property. Unlike section 2, which is very specific, these sections speak broadly in providing for retroactivity. Sections 5125(a) and 5127 declare that the equal management reforms apply to community property "whether acquired prior to or after January 1, 1975." Conflict between Civil Code section 5125(a) and section 7 of the

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127. The assumption here is that neither spouse contracted as agent for the other, that the contracts were not for "necessaries," and that no earnings of *W* have been commingled with *H*-managed property under circumstances smacking of fraud on creditors (*see note 77 supra*). In addition, as § 5116 applied during 1974, *H*-managed community property would be liable for *W*'s contracts if and to the extent that she had commingled her earnings with *H*-managed property.



clean-up Act arises if the term "community personal property" in amended Civil Code section 5125 is construed to include intangible rights and choses in action arising from contracts (*i.e.*, from a "transaction" covered by section 7). Unquestionably, section 5125 must be so construed. Contract rights are property requiring management and control by one or both of the spouses just as money, securities, or jewelry are. Certainly, the legislature intended in section 5125 to apply equal management to all forms of property (other than realty, which is treated in section 5127) and did not mean to create a statutory gap for community intangible contract rights for which there would be no provision concerning management and control. Thus, if one spouse attempts in 1975 to manage such pre-1975 intangible community property, section 5125 seems to permit this but section 7 bars it if the management decision will "affect" the pre-1975 act or transaction. Some hypothetical management situations illustrate the problem.

(1) In 1974 *H* deposits \$10,000 of *H*-earned community property, most of the couple's marital wealth, with his investment company. The agreement of deposit provides that the company shall invest the money in treasury notes or such securities as *H* specifies and that *H* can at any time withdraw from the deposit cash, notes, or other investments that the company has made. Nothing is said in the agreement about *W*. In 1975, with proof of her marital status and of the money's community character, *W* demands that the company turn over the money and investments (or half thereof) to her.

(2) In 1974 *H*, using *H*-managed community property, purchases a life insurance policy on his life (or on *W*'s), reserving the right to change designated beneficiaries. What is the effect if in 1975 *W* submits a change-of-beneficiary form, executed by her alone, naming her son by a prior marriage beneficiary of her half of the proceeds?

(3) In 1974 *H* files suit against *X* to recover funds owed on a debt that will be community property when collected. Can *W* alone in 1975 agree to settle the claim and dismiss the suit?

(4) Late in 1974 *H* leases a community-owned rental cottage to two college students for 9 months. In 1975, can *W*, acting alone and not as an agent of *H*, evict the students for breach of a lease provision? Can she waive covenant provisions of the lease?

a. *Seizing exclusive control under equal management and the duty of good faith:* Before considering the effect of section 7 on the hypothetical situations above, it is appropriate to analyze the powers

of the spouses in such situations where the initial act or transaction at issue occurs after the effective date of the reform legislation. The issue is: under an equal management system can one spouse by his or her contract or other action seize exclusive control of items of community property from the other spouse? If a spouse has such power in a totally post-1974 setting, certainly the same contract or act effective to seize control in 1975 should, if made or done prior to 1975, carry forward whatever exclusivity of control the spouse enjoyed in 1974. Moreover, if pre-1975 exclusive control of contractual relations entered into by one spouse would be consistent with post-1975 management and control provisions even without section 7, that section must have some purpose other than to assure that the other spouse will not, in effect, become a party to pre-1975 transactions.

It is obvious that the primary problem inherent in an equal management system is: what happens if the spouses cannot agree with respect to a management decision? In some cases it is clear that the first spouse to take action prevails. *W* thinks a community gold coin collection should be sold; *H* thinks it should be retained. If *W* sells it before *H* conceals it,<sup>128</sup> the deed is done. Where the transaction involves continuing rights and obligations, however, one must consider whether the spouse initiating the transaction has thereby seized control of it and disabled the other spouse from acting with respect thereto. For example, if *W* parted with the coin collection under circumstances raising a cause of action for rescission of the sale (*e.g.*, fraud by the buyer), can *H* rescind?

There are very few clues concerning legislative intent on this question. It appears that the California legislature looked mainly to the state of Washington for the pattern of sex-neutral management it adopted. The Washington statutes contain provisions that specifically prohibit one spouse who is managing a community business from entering into transactions involving business property that are not in the ordinary course of the business.<sup>129</sup> The California legislature rejected

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128. If *H*, as equal manager, conceals the coins for the good faith purpose of conserving them, this is probably an unobjectionable act. See CAL. CIV. CODE § 5125(e) (West Supp. 1975). Compare *Wilcox v. Wilcox*, 21 Cal. App. 3d 457, 98 Cal. Rptr. 319 (1971) (under pre-1975 law, *H* could obtain relief from *W*, who hid community money subject to *H*'s sole control). Query if post-1974 *H* could seize control of the coin collection and bar *W* from lawfully selling it by notifying all potential buyers that he, *H*, had determined that the collection should not be sold. Could *W* "rescind" that decision by *H*? Would *H*'s notification to potential buyers have any legal effect at all?

129. WASH. REV. CODE § 26.16.030 (1973). For a discussion of this provision (and consideration of what is a "business" that is pertinent to the California statute

this limitation on freedom of management in an equal management system by providing in amended Civil Code section 5125(d): "A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest."<sup>130</sup> Does this mean that *H* can take community funds and set up a business, and when *W* seeks to join in the management thereof refuse her the right to do so? Does it mean that if *H* were managing a community business in 1974—at which time *W* clearly had no right to join in the management without *H*'s consent—the reform package does not give her the right to participate in management in 1975? The answer to both questions seems to be "yes." The community-business exception to equal management in section 5125(d) seems to be addressed to third parties, warning them that if one spouse has been managing a business, a business transaction entered into with the other spouse will be void unless ratified under pre-1975 community property agency principles. The section should operate no differently if, in a case where *H* alone has been running the business, *W* announces to a third party that she has assumed her purported right to participate in management.<sup>131</sup> If in these circumstances *W* cannot lawfully deal with third parties, how can she unilaterally insert herself into the management process to avoid the disabling provision of section 5125(d)? It would seem this could be done only if *H* permitted her to hold herself out as comanager of the business formerly managed by *H* alone. If so, *W* has not one whit more power to

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as well as Washington's), see Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 794-96 (1974); Cross, *supra* note 12, at 537-41. See also Comment, *supra* note 107, at 1003-04.

130. Apparently, dual management under CAL. CIV. CODE § 5127 (West Supp. 1975)—joinder by both spouses in a conveyance or encumbrance—is required for real property held in a community business that is not incorporated or a partnership. This rejects the far more sensible provision of Washington law that if buying, selling, or leasing community realty is an ordinary business transaction of one of the spouse's business (e.g., *H* alone manages as his business some community-owned apartment houses), joinder of the other spouse in the instrument is not required. WASH. REV. CODE § 26.16.030 (6) (1973). Section 5127 ought to be amended to incorporate this feature of Washington law.

131. New Mexico is the one community property state whose equal management reform legislation specifically provides that one spouse by a contract with a third party can seize exclusive control of items of community property. N.M. STAT. ANN. § 57-4A-8(B) (1973). It is curious, however, that until July, 1975, New Mexico's original equal management reform expressly gave *W* "rights of management" of community business enterprises, assertable by her by filing a statement with the county clerk in the county of her residence. N.M. STAT. ANN. § 57-4A-7.1, *repealed* effective July 1, 1975, by H.B. 78, 32d N.M. Legislature, 1st Sess. § 7 (1975). This latter provision apparently assumed *H* had not seized control over all assets in the business through contracts with third parties under § 57-4A-8(B).

manage community business property than she had under pre-1975 agency principles, except that once *H* does let the apparent agency arise (*i.e.*, *W* appears to outsiders to be comanager), he probably could not now revoke it. In sum, the equal management scheme enacted in the first Act authorizes one spouse to seize exclusive control of community property by placing items of property in a community business while refraining from clothing the other spouse with apparent authority to manage that business.

This power to seize exclusive control by diverting community property to a business becomes even more clear in tracking the series of amendments to the clean-up bill, which culminated in the enactment of Civil Code section 5125(e): "Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property."

The clean-up bill as originally approved in the Senate would have enacted a subsection (e) to Civil Code section 5125, providing:

On or after January 1, 1975, a spouse may not (1) acquire or commence to operate or manage a business or interest in a business which would be community personal property or (2) transfer community personal property to a business or an interest in a business which the spouse is operating or managing, without the written consent of the other spouse.<sup>132</sup>

Clearly, the senators who approved the proposed new subsection (e) viewed the establishment of a business as a means provided in the first Act for one spouse without the other's consent to retain or to seize sole control of items of community property.<sup>133</sup> If the other spouse (say *W*, objecting to a diversion of community property to *H*'s business) had the right to insert herself as comanager, she then could have either regained equal control to be exercised in the business setting or taken the property out of the business and returned it to its prior status (*e.g.*, a family expense checking account) before *H* put it into the business. There would have been no need for the protection that the first proposal in the clean-up bill would have given *W* against *H*'s seizing control.

The Assembly, by amendment to the clean-up bill, struck out the proposed subsection (e), limiting the power to transfer community

132. S.B. 1601, 1973-1974 Legislature, § 3, as amended in the Senate June 10, 1974. A proposed subsection (f) would have given a spouse aggrieved by violation of the proposed 5125(e) an action for injunction or for recovery of damages from the other spouse.

133. See Kahn & Frimmer, *supra* note 33, at 517.

property to a business, and substituted the present subsection (e) with its good faith requirement.

Presumably the good faith test applies not only to *H*'s transfer of community money to his business but also to his exclusion of *W* from that business as comanager. If *H* does exclude *W*, this is an "act . . . with respect to the other spouse [*W*] in the management and control of the community property" and is to be tested by the good faith rule of section 5125(e). Most likely, also, breach by *H* of section 5125(e) will give *W* a cause of action against *H* during marriage. Property suits (i.e., those not involving personal injury) by one spouse against the other for relief from fraudulent dealings with marital property have long been sanctioned in California without benefit of a statute expressly creating the cause of action.<sup>134</sup>

Establishing a community business is apparently not the only means whereby one spouse can seize exclusive control of certain community assets. If the language of the Financial Code sections concerning deposits in the name of one spouse in banks and savings and loan institutions is given effect, the setting up of a savings or checking account becomes a simple device for defeating equal management.<sup>135</sup> Moreover, the implications of the broadly-worded "good faith" standard of Civil Code section 5125(e) are that any arrangement for seizing exclusive control by one spouse is lawful if there is no fraudulent intent. It is somewhat surprising, however, that the legislature was not more specific on this issue, especially since the New Mexico community

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134. See, e.g., *Wilcox v. Wilcox*, 21 Cal. App. 3d 457, 98 Cal. Rptr. 319 (1971); *Greiner v. Greiner*, 58 Cal. 115 (1881) (dictum). See generally Comment, *California's New Community Property Law—Its Effect on Interspousal Mismanagement Litigation*, 5 PAC. L.J. 723 (1974). Litigation between *H* and *W* over management will almost always involve separated spouses—usually spouses who are undecided whether to file for divorce, since in the dissolution action the divorce court can adjust property rights. The community property reforms have no special management and control provisions for separated spouses, yet obviously equal management is unlikely to work smoothly for them. Litigation seeking judicial division of management power between the spouses who are not prepared to ask for dissolution of marriage may become more common. Legislative attention to management and control problems of separated spouses is needed.

135. CAL. FIN. CODE §§ 851, 7601, 11200 (West Supp. 1975). See text accompanying notes 94-100 *supra*. Each section states that when a married person deposits funds in his or her own name, the account or investment certificate shall be "free from the control or lien of all other persons except creditors." (In § 851, "any other person except a creditor.") The sections do not limit creditors who can reach deposits to creditors of the spouse in whose name the account stands. Thus, the other spouse can indirectly affect the funds in the account by incurring debts in favor of creditors who will levy on the account.

property reform act of 1973, which California draftsmen must have examined, specifically provides for seizure of control. In New Mexico, *H* or *W* can in a written contract with a third party assert the right of exclusive control of community property described in the contract.<sup>136</sup> However, since it is established that subsection 5125(e) was enacted as a response to the attempt to limit a spouse's seizure of exclusive control by one device—placing community assets in a community business—it is logical that the good faith test is intended to be the sole limitation on attempts to seize exclusive control by any means. Assuming that a good faith seizure of exclusive control is permissible, several problems are at once apparent. How is a seizure of control to be achieved? Must a spouse specifically declare he or she is seizing control in order to do so? Or are there circumstances where the intent to do so will be implied? Where a spouse has attempted to seize sole control, will good faith be presumed? If so, how is the presumption rebutted?

In hypothetical (1) above—*H*'s deposit of \$10,000—the deposit agreement with the investment company providing that only *H* may withdraw the funds probably should be construed as a sufficiently specific assertion by *H* of sole control, although institutions receiving community funds would be well advised to add language to deposit contracts executed by one spouse alone that expressly states this intent. Will good faith by *H* be presumed? The general rule in California is that a person is presumed to act in good faith and that the burden is on one claiming bad faith to prove it.<sup>137</sup> To protect the investment company in the hypothetical situation and to avoid commercial chaos, it seems necessary to apply the normal presumption to *H*'s deposit agreement when *W* arrives at the company demanding the money. Indeed, if *W* should sue the company for damages based on its refusal to turn over the community property to her, the presumption of validity

136. N.M. STAT. ANN. § 57-4A-8(B) (1973). The New Mexico courts will probably imply a good faith standard in applying this statute. Probably the contract must relate to the property in some manner other than a bald seizure of control. For example, if *H* buys stock with community funds from *X* Co., an "agreement" with *X* Co. that *H* alone would forever control the stock may be void as unrelated to any continuing contractual relations between *H* and *X* Co. but valid if, in addition to purchasing the stock, *H* sets up a buy-sell account with *X* Co. and delivers to it securities *H* has purchased. There is then a continuing relationship between *H* and *X* Co. and a reason to agree that *X* Co. will take its directions from *H*, but not *W*, to avoid conflict.

137. *Maben v. Rankin*, 55 Cal. 2d 139, 142, 358 P.2d 681, 682, 10 Cal. Rptr. 353, 354 (1961); *Cuenin v. Lakin*, 146 Cal. App. 2d 855, 858, 304 P.2d 157, 160 (1956); *Arakelian v. Sears*, 53 Cal. App. 646, 653, 200 P. 757, 761 (1921); 18 CAL. JUR. 2d *Evidence* § 126 (1956).

of *H*'s deposit contract under Civil Code section 5125(e) should be conclusive in the investment company's favor unless *W* can establish that agents of the company actually knew of *H*'s bad faith.

This result—that *H* can tie up all the community property so that *W* cannot reach it without litigation—seriously undercuts the policy of the equal-management system enacted by the legislature. It is little solace to *W* to point out that she had the same power to deposit community funds in her name alone. But if the law were otherwise, financial institutions might never permit a married person to deposit money<sup>138</sup> except in a joint account, thereby creating a commercially crippling situation.<sup>139</sup>

So *W* must seek her relief against *H*, asking the court to enjoin him from interfering with her equal-management rights by tying up community funds. If she can bring the suit at all,<sup>140</sup> she will have to prove bad faith on *H*'s part. Suppose *W* convinces the judge that *H* has excluded her from equal management because he believes women as a class, and *W* in particular, are not competent managers of money. If *H*'s sexist beliefs are sincerely held by him, how should the court rule? Since the purpose of equal management is to relieve women from the effects of such bias, presumably such bias cannot form the basis for section 5125(e) good faith.

Suppose instead it is shown that *H* deposited \$10,000 in his name because *W* threatened to spend it to remodel their house, while *H* wanted to use it to buy a vacation home. On such a record, *W* has not rebutted the presumption of good faith but merely has proved a disagreement between spouses as to management of community funds. The dispute is plainly nonjusticiable, and *W* must content herself with

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138. In hypothetical (1), even if *W* conclusively proved the money and securities were community property, they nevertheless might be part of *H*'s own community business and for that reason not subject to her management. CAL. CIV. CODE § 5125(d) (West Supp. 1975). If *H* makes a deposit without any instructions implying that he is seizing control, should applicability of the "business" exception to equal management be presumed? The protection of third parties and of commercial activity in general requires a rule that the third party holding the community funds and refusing to turn them over to *W* will be protected from liability if there was any basis for it to conclude that the funds were in fact part of *H*'s business.

139. See also Kahn & Frimmer, *supra* note 33, at 518-19, predicting that life insurance companies and stockbrokers will react to the 1975 reforms by requiring authorization of both spouses for all transactions or written consent in advance of one spouse conferring exclusive control on the other.

140. See authorities cited in note 134 *supra*. An allegation of bad faith should make *W*'s complaint nondemurrable.

knowing that the present sex-neutral law gives her the same power *H* has to race to take control of community property.

Hypothetical (2)—the life insurance policy—is substantially different. Unless the policy was taken out by *H* for business reasons, which ought to be apparent to the insurer, *H* cannot possibly be in good faith in contracting after 1974 with the insurer so that *W* cannot designate the beneficiary of half the proceeds. Even under pre-1975 law, *H* could not tie up *W*'s half of the community proceeds by contracting that they be paid out on his death as an annuity.<sup>141</sup> After 1975, there is no reason at all why *H* should be able to make *W* wait until his death to assert her rights. And if *H* has insured *W*'s life, asserting the contract right to designate the beneficiary of *W*'s half of the proceeds is in effect an exercise of *W*'s testamentary power. *W* has a right to bequeath her half of the proceeds by will, and *H* could not possibly be in good faith in attempting to bar her from using her half interest in community property life insurance as a will substitute.

Suppose, however, that the insurer is responsible for the language of the policy that permits only *H* to change beneficiaries—it was an adhesion contract, and *H* never read that part of the policy. The insurer proves that it had no intent to defeat *W*'s rights but merely to establish a convenient procedure to deal only with persons known to have authority to manage the policy. Neither party to the insurance contract is technically in bad faith, but *W*'s rights should not be so easily defeated. The post-1974 policy could easily provide that the insured's spouse as well as the insured is entitled to manage the policy unless a written waiver by the spouse is filed.

The policies of the reform legislation appear to require holding *W*'s beneficiary designation to be valid. Section 5125(e) can be interpreted to mean that an act by one spouse may not be permitted to cut off the other spouse's equal management rights without a good reason.<sup>142</sup> If *H* has not even thought about the effects of his contract

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141. *Tyre v. Aetna Life Ins. Co.*, 54 Cal. 2d 399, 353 P.2d 725, 6 Cal. Rptr. 13 (1960). See also *Modern Woodmen of America v. Gray*, 113 Cal. App. 729, 299 P. 754 (1931); *New York Life Ins. Co. v. Bank of Italy*, 60 Cal. App. 602, 214 P. 61 (1923).

142. Thus, even if it has been rejected by the insurer, *W*'s designation of a beneficiary is enforceable as to half the proceeds of the community policy. See *Equitable Life Assurance Soc'y of the United States v. Baden*, 83 F. Supp. 208 (S.D. Cal. 1949), where the insurer wrongfully rejected *H*'s designation of his aunt as beneficiary of his interest in the policy upon the erroneous theory that *W* had to consent to such a designation. *H*'s designation was enforced in equity because he had done all he could to make it effective.



on *W*'s rights, his conduct should be characterized as "no faith," rather than the "good faith" that is required. No substantial rights of the insurer being involved, a seize-control clause in a life insurance contract should be held void as against public policy unless the insurance policy is purchased in a commercial setting—*e.g.*, *H* has contracted with a partner to insure *H*'s life to provide funds for the partner to buy out *H*'s interest on his death in consideration for the partner making *H* beneficiary of a policy purchased by the partner for the same purpose.

In hypothetical (3)—*H*'s post-1975 lawsuit against *X*—the courts will surely hold that a spouse may in good faith seize exclusive control of the litigation. It is in the interest of the community that court documents filed on the community's behalf be consistent and received without dispute by the court. It would also be unseemly for the courts to become the arena for marital infighting by way of the filing of inconsistent pleadings. The problem here is not so much *can H* seize control but *how*? Should he file with the clerk a specific document announcing his seizure of control? Or does the simple naming of himself rather than himself and his wife as the plaintiff suffice?

Ordinarily, the policies of equal management would be defeated by inferring intent to seize control by one spouse. An expressed, unequivocal assertion of exclusive control should usually be found before the other spouse is held disabled from acting. Nonetheless, there will be a few situations where the very nature of the transaction is inconsistent with equal management. The commencement of a lawsuit by *H* is one such situation. The mere act of *H* naming himself as plaintiff should bar *W* from filing pleadings or a dismissal.<sup>143</sup>

In hypothetical (4)—the 9-month lease—an express seize-control clause presumptively would be valid. The tenants may have wanted such a clause in order to know who was in charge if *H* and *W* got into a disagreement concerning the leasing arrangement. The presumption of *H*'s good faith should be conclusive in litigation involving the tenants unless it can be shown that they and *H* had as their purpose in agreeing to the seize-control clause the defeating of *W*'s equal-management rights.

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143. If the complaint names *H* and *W* as plaintiffs, seizure of control probably may still exist by way of the initiating spouse having selected the counsel of record, if the pleadings make clear who that spouse is (*e.g.*, if the complaint is verified by *H*). In such a case *W* should not be able to substitute counsel, make her attorney an additional counsel of record, or file documents *in propria persona*. On the other hand, if the complaint is not clear as to which spouse selected counsel of record, the court will probably have to permit either *H* or *W* to substitute counsel. The alternative would be a time-consuming evidentiary hearing to determine which spouse had initiated the litigation and thereby seized control.

As with the suit against *X*, the problem is not so much *can H* do it but *has* he done it. Suppose the lease has no express clause making *H* the sole marital partner authorized to deal with the rental agreement but instead simply names *H* as the landlord. This does not seem to be the type of transaction where exclusive control is especially beneficial, nor would most tenants think of asking for such a clause or have any expectations from the naming of *H* as landlord that they would not be dealing with *W*. Thus, if the entire transaction were post-1974, *W*, although not named as landlord, should be able to evict the tenants for breach of covenant or waive covenant violations on her own, not just as *H*'s agent.

b. *Freezing control under pre-1974 contracts:* The lengthy digression into the power of one spouse to seize sole control of community property consisting of contract rights and choses in action after 1974 shows that there will be some transactions, such as noncommercial life insurance, where this cannot be done and many others, such as the 9-month lease, where an express seize-control clause will be required in order to disable the other spouse from exercising management powers.

The purpose of section 7 of the clean-up Act, providing that no pre-1975 act or transaction shall be affected, appears to limit the retroactivity provisions of Civil Code sections 5125 and 5127 by continuing exclusive control in one spouse, usually *H*, of all pre-1975 contractual rights. Section 7 prohibits transaction-regulating retroactivity of the equal-management provisions. This protects third-party reliance on prior law. The insurance company that issued *H* a policy prior to 1975 would otherwise incur an unexpected burden upon receiving *W*'s beneficiary designation in 1975. Under prior law, the insurer had no reason to add to the policy a provision such as one authorizing *W* to change beneficiaries that would have eliminated these burdens.

Likewise, if *W* tries to assert rights under *H*'s lease against the college student tenants, they can ignore her unless she is acting as *H*'s agent. While it is unlikely that this protects any real expectations of the tenants, it is possible they would have asked for an exclusive-control clause making *H* their sole landlord had they anticipated the change in the law. In any event, the language of section 7 is plainly applicable to the hypothetical lease without a seize-control clause naming *H* as the landlord, since to insert *W* on January 1, 1975, as co-managing landlord would "affect" a pre-1975 "transaction." Moreover, convenience of administration of the law is fostered by a blanket rule of prospectivity for a broad class of transactions to eliminate the need to litigate in each

case whether any expectations of the parties based on pre-1975 law are defeated by retroactivity of the new law.

It is also significant that the prospectivity provision is plainly for the benefit of third parties, not the spouses, just as transaction-regulating retroactivity authorized in Civil Code section 5116 is intended to benefit creditors, not the spouses.<sup>144</sup>

Accordingly, "act or transaction" in section 7 should be narrowly defined to embrace only such transactions where, when the question of retroactivity arises, continuing relations between a spouse and the third party are affected. For example, if *H* purchases some recreational equipment with *H*-managed community funds in 1974—an act and a transaction—and *W* sells it in 1975 to *X*, who knew the equipment had been purchased by *H* in 1974,<sup>145</sup> *H* cannot set aside the sale to *X*

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144. But see the text accompanying notes 79-82 *supra* and 206-07 *infra*, respecting situations when § 5116 operates to benefit some creditors while harming others.

145. The apparent authority of a spouse to dispose of items of community property to a third party who is unaware of an impediment to that spouse's power to manage the property (*i.e.*, if the property is subject to an unrecorded seize-control clause in a contract made by the other spouse, if the property is held under a pre-1975 contract made by the other spouse, or if the property is part of one spouse's business) is unclear. Legislation addressing the problem is needed. See TEX. FAM. CODE § 5.24 (1975), allowing a third party to rely on a spouse's possession of an item of community property not held under a certificate of title as empowering that spouse to deal with it, even though in fact it is "mixed" community property and subject to dual management.

Under older California law, a third party dealt with *W* at his peril, and apparently her mere possession of community property was not sufficient to give her ostensible authority to sell it. Cf. *Hulsman v. Ireland*, 205 Cal. 345, 270 P. 948 (1928) (to hold *H* liable on *W*'s contracts an agency must be proved, but in the *H-W* context less proof of agency is required than in other cases); Comment, *Community Property: Agency: Liability of Husband for Debt Incurred by Wife*, 17 CALIF. L. REV. 265 (1929). If a statute required joinder by *H* and *W*, third parties dealt with *H* at their peril, too. See *Mark v. Title Guar. & Trust Co.*, 122 Cal. App. 301, 9 P.2d 829 (1932). I am aware of no reported cases where bona fide third parties took personalty from *H* alone, although there was in existence a contract between *H* and *W* providing for dual management of such personalty. Presumably such secret limitations on the ordinary management powers conferred by law could not be asserted against the third party purchaser for value.

Whether after 1951, when *W* obtained management of her uncommingled earnings, a third party still purchased from *W* at his peril has apparently not been decided. If she told the buyer the item being sold was purchased with her uncommingled earnings, could he rely on this? Even more perplexing, suppose in fact the item of property had been purchased with *W*'s uncommingled earnings and *H* attempted to sell it to the third party, stating that the property was community (which was true). Could the buyer rely on *H* having authority to sell? The reported cases involve situations where the third party ought to have known that the spouse he was dealing with did not have authority. See *Newell v. Brawner*, 140 Cal. App. 2d 523, 295 P.2d 460 (1956), where *W* transferred household furnishings to a third party. Under former CAL. CIV. CODE § 171c

(later § 5124), *W* presumably had exclusive management of the furnishings if they were purchased with her uncommingled earnings. Curiously, § 171c did not require *W* to obtain *H*'s joinder in a transfer of such furnishings, although § 172 barred *H* from transferring such items of property without *W*'s joinder. The court simply cited the management statute, § 172, for the proposition that *W*'s transfer was a nullity, the suggestion being that if her transferee wanted to rely on § 171c he ought to prove that the property was *W*-managed. However, in *Newell*, *W*'s transferee was her own father and no consideration is mentioned in the opinion. It hardly can be read to state a rule that even after she was given management of certain classes of community property a third party purchased from her at his peril.

Between 1951 and 1975, probably the great bulk of community property was not subject to *W*'s management. Exactly the opposite is now true. Security in commercial transactions would be fostered by a statute entitling bona fide third parties paying value to rely on a spouse's possession of items of community property not held under certificates of title as empowering that spouse to deal with the property. For example, if *W* takes a filing cabinet from *H*'s business to her own business and then sells it to a bona fide purchaser, why should *H* be able to set aside this sale? *W*, the vendor, is not a stranger to the "title" or ownership of the cabinet. She is one of two equal owners with equal management power in most circumstances. CAL. CIV. CODE § 5125 (West Supp. 1975).

Legislation should also address the problem of apparent authority of one spouse to sell property bought partly with community funds and partly with the other spouse's separate funds. This issue arises for the first time in 1975. Under prior law, if the separate owner, say *W*, mixed her separate funds and community funds in making a purchase, for *W* to have authority to make the purchase legally the nature of the community funds had to be such (if *W* was acting lawfully) that *H* had no control over them. Hence, *H* could not sell even an undivided interest in the item (*i.e.*, the community's interest). Now, however, after *W* makes the "mixed" purchase *H* has, under § 5125, at least the power to sell the undivided interest of the community. Does the buyer from *H* assume the risk that there is some undivided separate interest in the property that *W* may claim in the future? Even where there is no instrument of title showing *W*'s interest, prior case law would suggest that in this situation the buyer does deal with *H* at his peril. If that is the law, a spouse's mixing a bit of separate property into the purchase price effectively deprives the other spouse of equal management over the item, since buyers cannot confidently deal with the other spouse. And since the buyer will never know if there has been such a mixing, the pressure is on the third parties as feared by Kahn and Frimmer, *supra* note 33, to convert in practice equal management to dual management with respect to personalty as well as realty transactions.

A statute such as TEX. FAM. CODE § 5.24 (1975) is one solution, but it should go farther than Texas has and provide that, where one spouse, *W* in the above hypothetical, mixes separate property of hers with community property, she thereby, as a matter of law, appoints *H* her agent to transfer her separate property interest. If the legislature does not act, the courts can provide a partial solution by overruling cases like *Vieux v. Vieux*, 80 Cal. App. 222, 251 P. 640 (1926), that give the separate estate an undivided interest where community and separate funds are both used to make a purchase, in favor of the Louisiana rule. In that state, the owner of the separate property mixed into the purchase price converts the separate property into community and obtains in lieu a cause of action for reimbursement that can be asserted upon dissolution of the community. *Blalock v. Blalock*, 259 So. 2d 367 (La. Ct. App. 1972).

Nevertheless, until there is a statutory solution to the apparent authority problem, third parties, to be safe, must assume the old law—one deals with a spouse at his peril—still applies. A transaction by one spouse can be upset by proof that one of the exceptions to equal management was applicable.

on the ground *X* knew *W* could not manage the equipment. In fact, she could. *H*'s purchase transaction was completed; his relations with the seller of the equipment were terminated when he paid for the purchase. Although *W*'s subsequent sale to *X* "affects" *H*'s transaction in the sense that he loses the use of the items he bought, section 7 is inapplicable. If this were not so, the retroactivity provisions of Civil Code sections 5125 and 5127 would be completely wiped out by section 7, contrary to the rule of statutory construction that effect should be given to all provisions of a statute when this can reasonably be done.<sup>146</sup>

C. RETROACTIVITY OF PROVISIONS IN THE REFORM PACKAGE  
WHERE THE LEGISLATURE HAS NOT SPECIFICALLY  
EXPRESSED ITS INTENT

Where the legislature specifically addressed retroactivity questions, it has in four significant instances directed prospective-only application.<sup>147</sup> In two other instances, the legislature has made explicit provision for retroactive application.<sup>148</sup> There remains to be considered the apparent legislative intent concerning several provisions in the primary Act, where the legislature did not expressly state a position on retroactivity, as well as provisions of the clean-up Act, where the question is the effect of section 7. In addition, the provisions of the Probate Code reforms not relating to devolution of property at death but to management and control are not covered by an express retroactivity provision.

1. *Other Provisions of the Clean-up Act*

a. *Liability for necessities*: The clean-up Act repealed former Civil Code section 5130,<sup>149</sup> which provided that if *H* neglected to support *W*, "any person may in good faith supply her with the articles nec-

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146. *Prager v. Isreal*, 15 Cal. 2d 89, 93, 98 P.2d 729, 731 (1940); CAL. CIV. PRO. CODE § 1858 (West 1955); 45 CAL. JUR. 2d *Statutes* § 117 (1958).

147. These are: all of the provisions affecting estate administration and devolution of property at death, with the exception of some of the implications of CAL. PROB. CODE § 205 (West Supp. 1975); repeal of the profemale presumption in CAL. CIV. CODE § 5110 (West Supp. 1975); extension to *H* of the antideficiency judgment provision of § 5123 (West Supp. 1975); and the new sex-neutral presumption of validity of certain real estate transfers in § 5127 (West Supp. 1975).

148. In CAL. CIV. CODE § 5116 the legislature specified complete retroactivity, which will be transaction-regulating. In establishing equal management under CAL. CIV. CODE §§ 5125 and 5127, it specified partial retroactivity to avoid transaction-overturning and transaction-regulating effects.

149. Ch. 1608, § 8, [1969] Cal. Stats. 3343, derived from former § 174 of the Civil Code of 1872.

essary for her support, and recover the reasonable value thereof from the husband." That is, *H*'s separate property and *H*-managed community property were liable for such debts. It is unclear why this statute was repealed rather than amended to be sex-neutral. Apparently, the legislature reasoned as follows: under amended section 5116, *W* can take care of herself by contracting to buy necessities and thus binding all the community property; where there is no community property, *H*'s separate property is liable for necessities ("support") under amended section 5132; therefore, no further statutory treatment of liability of marital property for necessities is needed.

This is correct only if under section 5116 "the contracts of either spouse," for which community property is liable, include debts for necessities supplied to a spouse by a third party. For example, *W* is injured and in a coma, and her mother contracts for necessary medical and nursing care. If *W* recovers, she undoubtedly ratifies her mother's contract for her, and it becomes her contract under section 5116. If *W* dies without regaining consciousness, it seems to be the legislative intent to impute the contract for necessities to her as a matter of law, making all community property liable under section 5116.

Enabling the supplier of necessities to proceed under section 5116 rather than the repealed section 5130 improves the creditor's position in two ways. First, he can sue for the contracted price rather than just the reasonable value as former section 5130 provided. Second, the creditor need not prove that *H* had "neglected" to supply the necessities to *W*.<sup>150</sup>

Where a pre-1975 supplier of necessities to *W* seeks to invoke amended section 5116 to collect the contract price and avoid the need to prove *H*'s "neglect" to supply the necessities, a conflict arises. Section 5116 does apply to pre-1975 contracts in general.<sup>151</sup> But the fourth Act also repealed the prior law respecting *H*'s liability for necessities (former Civil Code section 5130), subject to section 7's directive that no pre-1975 act or transaction, which on its face includes a

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150. The requirement that the supplier of necessities must, to reach *H*-managed property, prove that *H* "neglected" to supply them to *W* still appears in the statutes of some community property states. LA. CIV. CODE art. 1786 (Slovenko 1961); NEV. REV. STAT. § 123.090 (1973); TEX. FAM. CODE § 4.02 (1975). The requirement has been strictly enforced in some cases (*e.g.*, *General Tire Serv. v. Nash*, 273 So. 2d 539 (La. Ct. App. 1973)) and simply ignored in others (*e.g.*, *Goldring's, Inc. v. Seeling*, 139 So. 2d 538 (La. Ct. App. 1962)), apparently on the theory that if *W* or some third party has to buy the item, *H* obviously has neglected to do so himself.

151. See text accompanying notes 120, 127 *supra*.

debt for necessities, be affected. Amended Civil Code section 5116, which concerns all debts, seems less specific than former section 5130, which treats only debts for necessities and which is not repealed with respect to obligations incurred before 1975. *H* thus contends the supplier of necessities must prove *H*'s "neglect" and can recover only the reasonable value of the items, not the contract price.

However, the analysis above of section 7 of the clean-up Act<sup>152</sup> shows that it was intended to protect pre-reform rights of third parties to a pre-1975 transaction involved in some capacity other than just creditor (*e.g.*, the life insurance company in hypothetical (2) and the tenants in hypothetical (4)). Moreover, the statement of legislative policy that introduces the fourth Act<sup>153</sup> shows that the legislature intended all creditors to receive the benefits of the new rules concerning liability of community property, and in particular the broader creditors' rights of amended section 5116. That section should therefore be available to pre-1975 suppliers of necessities to a spouse.

b. *Gifts of community property*: Civil Code section 5125 was wisely amended to eliminate the requirement that consent by one spouse to the other's making a gift of community property be in writing. Although the statute is now silent as to how the necessary consent can be expressed, presumably California law is now like Washington's, where consent can be oral or implied.<sup>154</sup> Section 7 of the clean-up Act, providing for prospective-only application of its reforms, by its terms applies to this change in the law—a gift is an "act" or "transaction." *W* should be able to set aside in 1975 a gift by *H* to which she orally consented in 1974. Moreover, if *H* completed a voidable gift in 1974 by making delivery to his donee, *W*'s oral ratification in 1975—although sufficient for 1975 gifts—will not bar her subsequent suit to set the gift aside. To so hold would make *W*'s conduct that has legal significance only under amended Civil Code section 5125 "affect" a pre-1975 "act or transaction" as prohibited by section 7.

c. *Sale of household furnishings by W*: Amended Civil Code section 5125 now provides that *W* alone may not convey or encumber community household furnishings without *H*'s written consent. Apparently, prior to 1975 *W* could have done so if such items had been purchased with her uncommingled earnings.<sup>155</sup> Former Civil Code

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152. See text accompanying notes 122-46 *supra*.

153. See text accompanying note 121 *supra*.

154. WASH. REV. CODE § 26.16.030(2) (1973).

155. See note 145 *supra*.

section 5124, which gave *W* management power over such earnings, failed to echo section 5125, the male management provision, by not proscribing a unilateral sale of the household goods by *W*.

Section 7 of the clean-up Act means that a pre-1975 sale by *W* of household furniture bought with her uncommingled earnings remains valid; there will be no transaction-overturning retroactivity for amended section 5125. More interesting, suppose *W* made an offer to sell the furniture in December, 1974, that was accepted by her offeree in 1975. Under section 7, *W*'s offer seems to be a pre-1975 "act" that would be "affected" if the new law prevented her offeree from accepting it. The contract would be valid.

d. *The good faith test of a spouse's management:* As previously discussed, Civil Code section 5125(e) now provides that spouses shall act in good faith in managing community property. Probably that is not a weakening of pre-1975 standards. Although the courts often spoke of the managing spouse having fiduciary duties of a trustee,<sup>156</sup> in fact such a rigorous standard was never applied to acts of management,<sup>157</sup> but only to impose a strict duty of disclosure and fair dealing upon divorce.<sup>158</sup>

Assuming that actually the good faith standard is somewhat weaker than that imposed by prior law, section 7 of chapter 1206 should mean that pre-1975 management decisions ("acts") are to be tested by prior law, not the good faith standard.

e. *Repeal of Civil Code section 5117:* The clean-up Act repealed former Civil Code section 5117.<sup>159</sup> It made *W*-managed community property subject to liability for debts contracted by *H* for necessities furnished to either of them while living together; otherwise, according to section 5117, *W*-managed property was not liable for *H*'s debts. Since it has been shown that section 7 of the clean-up Act can-

156. See *Baker v. Baker*, 260 Cal. App. 2d 583, 586, 67 Cal. Rptr. 523, 524 (1968) (extremely strong dictum); *Vai v. Bank of America*, 56 Cal. 2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961); *Fields v. Michael*, 91 Cal. App. 2d 443, 205 P.2d 402 (1949).

157. See, e.g., *Williams v. Williams*, 14 Cal. App. 3d 560, 92 Cal. Rptr. 385 (1971); Grant, *How Much of a Partnership is Marriage*, 23 HARV. L.J. 249, 252-55 (1971). Kahn and Frimmer, *supra* note 33, at 519, are in accord that new § 5125(e) does not impose a fiduciary duty in the area of management and control.

158. See, e.g., *Vai v. Bank of America*, 56 Cal. 2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961). But see *Boeseke v. Boeseke*, 10 Cal. 3d 844, 519 P.2d 161, 112 Cal. Rptr. 401 (1974), holding that even at divorce the strict fiduciary duty does not apply where the other spouse is represented by independent counsel.

159. Ch. 1608, § 8, [1969] Cal. Stats. 3340, derived from § 168 of the Civil Code of 1872.



not be applicable to amended Civil Code section 5116 because of the express retroactivity provision therein, section 7 also may not apply to the repeal of section 5117. Otherwise, there would be a direct conflict. If the repeal of section 5117 were only given prospective effect, the immunity of *W*-managed community property from liability for *H*'s pre-1975 debts would be retained; but section 5116, as amended, says such immunity is to be retroactively abolished. The repeal of section 5117 is therefore to be fully retroactive with respect to unpaid creditors of *H* and former section 5117 can be ignored by such creditors, regardless of when their contract with *H* was made.

## 2. *Other Provisions of the Primary Reform Legislation*

It was noted above that, despite the words "[t]his act shall not apply . . ." in section 7 of the clean-up Act, its policy against transaction-overturning and transaction-regulating retroactivity seems to have broader applications and should be considered in dealing with provisions of the primary Act as well. Similarly, the policy behind the explicit retroactivity provision of amended Civil Code section 5116 in favor of maintaining the managerial system of creditors' rights and of full retroactivity in favor of pre-1975 creditors must be considered in analyzing the primary Act.

Finally, the general presumption against any retroactive application of statutory changes must be considered.<sup>160</sup> It must be conceded that many sections of the first Act of the reform package do not show, on their face, a legislative intent that any type of retroactive effect be given to the statutory changes. Nevertheless, I suspect that contemporary California courts would follow *In re Estrada*<sup>161</sup> by holding that the presumption of prospectivity is not a "strict" rule of construction but simply one aid to the courts in interpreting a statute. It is probable that if the courts reasonably believe from extrinsic clues (including section 7) that they can ascertain legislative intent concerning retroactivity in the first Act, that intent will be given effect.

a. *Children of the spouses as creditors*: The primary Act adds Civil Code section 199, which singles out children as a disfavored class of creditors. If *W* remarries, her children by a prior marriage cannot reach any of *H*-2's community earnings to discharge *W*'s child support obligation, notwithstanding *W*'s equal management thereof.<sup>162</sup>

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160. See notes 111-16 and accompanying text *supra*.

161. 63 Cal. 2d 740, 745, 408 P.2d 948, 952, 48 Cal. Rptr. 172, 176 (1966).

162. The statutory authority prior to 1975 for children recovering support from *W*

It appears that the purpose of section 199 is to prevent equal management from disqualifying children from welfare. Were it not for section 199, the new system of dual management would make community property acquired during the marriage of *W* and *H-2* available for the support of *W*'s children of the prior marriage because all community property is now liable for the postnuptial debts of either spouse. Yet, the change to equal management does not increase the total wealth available for both *W*'s children by her prior marriage and members of the family of her second marriage. Section 199 prevents all of the community property from being included in determining the resources *W* has for the children of her prior marriage in calculating welfare eligibility.

At least where there is no pre-1975 judgment against the spouse compelling her or him to support a child of the prior marriage, it would seem that section 7 of the clean-up Act does not apply to the question of retroactivity of section 199. The facts that cause a claim for child support to arise do not seem to be the kind of "acts and transactions" that section 7 refers to. Moreover, if the assumption that the purpose of making children of a prior marriage a disfavored class of creditors is to preserve welfare benefits is correct, the legislature has no reason to want section 199 to be retroactive in any respect with regard to support owed prior to 1975.

What if the child has obtained, prior to 1975, a judgment against *W* for support?<sup>163</sup> This judgment would seem to be the type of "act" or "transaction" that section 7 protects from transaction-regulating retroactivity.

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was former CAL. CIV. CODE § 5127.5, which made approximately half of *H-2*'s earnings liable for support of *W*'s children of a prior marriage. Whenever CAL. CIV. CODE § 199 (West Supp. 1975) is by its terms, applicable, it would seem to repeal by implication § 5127.5. See Bonanno, *supra* note 36, at 106.

Although § 199 does not say so expressly, it should be construed to permit the children of *W* to reach a commingled mass of *H*'s and *W*'s earnings to the extent that *W* made contributions (*i.e.*, it would operate as did the interim 1974 § 5116, ch. 987, § 6.5, [1973] Cal. Stats. 1899). Since 1974, there is no pressure on *W* to keep her earnings uncommingled, and, if the children could reach only uncommingled earnings of *W*, there would be many cases where § 199 would give them no remedy at all.

163. CAL. CIV. CODE § 199 (West Supp. 1975) provides:

The obligation of a father and mother to support their natural child under this chapter, including but not limited to Sections 196 and 206, shall extend only to, and may be satisfied only from, the earnings and separate property of each, if there has been a dissolution of their marriage as specified by Section 4350.

The annotations to CAL. CIV. CODE §§ 196 and 206 indicate that many support claims by children are based on these statutes.

If the judgment is for a lump sum, such as for reimbursement for sums used to provide for the children in 1974, retroactive application of section 199 would establish an after-the-fact exemption depriving the children of their right to reach approximately half of *H-2's* earnings.<sup>164</sup> To deprive the judgment-creditor of such rights is the very type of retroactivity section 7 forbids.<sup>165</sup>

Suppose, however, the judgment is a modifiable judgment ordering the parent to pay a specified monthly sum for child support. This judgment, too, is a pre-1975 "act." Does section 7 mean that where *W's* children have such a pre-1975 judgment they can continue to reach half of *H-2's* earnings? It is clear that *W's* children under a post-1974 judgment cannot reach any of *H-2's* earnings, and to allow children with a pre-1974 judgment to reach *W's* share of such property after 1975 would create discrimination among creditors (children or those who have supplied them with necessities). Such discrimination is contrary to the legislature's stated policy underlying the reform package.<sup>166</sup> In addition, the children with the pre-1975 judgment might not qualify for welfare that others with post-1975 judgments would receive because of the availability to the first group of approximately half of *H-2's* earnings. The desirable result is thus that section 199 apply to modifiable pre-1975 support judgments. The courts can reach this result on the following reasoning: support owing for 1975 and subsequent years must be paid not because of the judgment, for if circumstances had changed in 1975, *W* could have had the judgment modified to reduce or even eliminate her support obligation; rather, the support is owing because in 1975 the children have continued to be in need, the judgment being merely a procedural device for enforcement of the claim arising in 1975.

b. *H's power to select marital domicile*: Under prereform law, *H* was empowered by former Civil Code section 5101 to select the married

164. This right was explicitly provided for in CAL. CIV. CODE § 5127.5 (West Supp. 1975).

165. If *W* has no earnings, to deprive the children of their rights under CAL. CIV. CODE § 5127.5 (West Supp. 1975) to collect on a pre-1975 judgment sums owed before 1975 is transaction-regulating retroactivity so extreme—removing the only remedy—as probably to amount to a taking of property. It has been held that simply giving a debtor a new exemption after judgment is entered is an unconstitutional impairment of a creditor's rights. See note 469 *infra*. The "taking" is an especially severe penalty for the children's delay in levying execution on the pre-1975 judgment where pre-1975 earnings of *H* are exempted. In addition, there would seem to be no less a taking of the children's claim for support owing in 1974 when it is reduced to judgment after January 1, 1975, and § 199 is applied.

166. See text accompanying note 121 *supra*.

couple's domicile.<sup>167</sup> The repeal in the first Act of this statute<sup>168</sup> apparently means either spouse can choose a domicile for himself or herself. A pre-1975 act by *W* sufficient under present law to establish a domicile could not be given effect, however, due to the "act or transaction" test of section 7 of the clean-up Act.<sup>169</sup>

c. *Liability of separate property for necessities:* The first Act amended Civil Code section 5121<sup>170</sup> to provide that the separate property of a spouse is not liable for debts incurred by the other spouse. Under preamendment section 5121, this exemption applied only to separate property of *W*.<sup>171</sup> However, the rule was the same with respect to *H*'s separate property under general principles of the managerial system developed in the case law.

A further amendment to section 5121, coupled with an amendment to Civil Code section 5132, does, however, create a substantial change in the law. Prior to 1975, *H*'s separate property was liable for necessities supplied to himself and to *W* if he neglected to provide for her.<sup>172</sup> However, under the pre-1975 language of section 5121, when *H* contracted for the necessities, none of *W*'s separate property was liable except items thereof that became *W*'s separate property by gift from *H* or transmutation agreement<sup>173</sup> with him. Now the separate

167. Ch. 1608, § 8, [1969] Cal. Stats. 3337, reenacting § 156 of the Civil Code of 1872.

168. Ch. 987, § 2, [1973] Cal. Stats. 1898.

169. See *In re Wicke's Estate*, 128 Cal. 270 (1900), for a factual situation in which retroactive change in the law concerning a spouse's power to establish domicile might be significant.

170. CAL. CIV. CODE § 5121 (West Supp. 1975) (emphasis added) provides:

The separate property of a spouse is liable for the debts of the spouse contracted before or after the marriage of the spouse, but it is not liable for the debts of the other spouse contracted *after* marriage; provided, that the separate property of the spouse is liable for the payment of debts contracted by either spouse for the necessities of life pursuant to Section 5132.

Note that the wording is such that the preposterous decisions (*see* note 77 *supra*) based on the old English law of coverture, holding *H* liable for *W*'s premarital debts, are still, under the strict wording of the statute, possible. Worse, *W*'s separate property could be held liable for *H*'s premarital debts. An amendment to § 5121 prohibiting such results should be enacted.

171. See note 173 *infra*.

172. Ch. 1608, § 8, [1969] Cal. Stats. 3314, derived from § 174 of the Civil Code of 1872.

173. Contrary to what has sometimes been said (*see* *Medical Fin. Ass'n v. Allum*, 22 Cal. App. 2d Supp. 747, 66 P.2d 761 (App. Dep't Super. Ct. 1937); *Turner v. Talmadge*, 42 Cal. App. 794, 187 P. 969 (1919)), the awkward double proviso language of former CAL. CIV. CODE § 5121 did not exclude from liability for necessities separate property of *W* created in a nondonative contract between *H* and *W* dividing community property between them with each taking half as his or her separate property.

property of both *H* and *W* is liable for necessities provided to the family without regard to the source of such property.<sup>174</sup>

174. CAL. CIV. CODE § 5132 now provides in part: "A spouse must support the other spouse while they are living together out of the separate property of the spouse when there is no community property or quasi-community property." The reference to quasi-community property in CAL. CIV. CODE § 5132 (West Supp. 1975) is peculiar. It was added to the statute dealing with *W*'s support obligation (formerly § 176) in ch. 636, § 2, [1961] Cal. Stats. 1838, which created the category of quasi-community property for purposes of resolving the status of marital property at death or divorce, and with respect to homestead declarations and gift taxes. For most purposes, quasi-community property is no different than ordinary separate property until dissolution of the community by death or divorce. See *Addison v. Addison*, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965). But see discussion of quasi-community property and the declaration of homesteads in Comment, *Marital Property and the Conflict of Laws: The Constitutionality of the Quasi-Community Property Legislation*, 54 CALIF. L. REV. 252, 269-72 (1966). To give literal effect to § 5132 would cause absurd consequences. Suppose *H* has \$100 worth of quasi-community property—his earnings while domiciled in an English common law state that would have been community if acquired while domiciled in California (see CAL. CIV. CODE §§ 4803-04 (West 1956))—and \$100,000 ordinary separate property (e.g., an inheritance). There is no community property. *W* buys necessities on credit. If § 5132 is read literally, the presence of the \$100 quasi-community property means that, because the absence of quasi-community property is, by the terms of the statute, a condition to a spouse's obligation to support the other spouse, the creditors cannot reach the \$100,000; nor does any statute make the quasi-community property liable.

The only sensible interpretation of § 5132 is that it creates a pecking order of liability—the supplier must first levy on the quasi-community property, and only when that is exhausted may the creditor levy on the ordinary separate property.

Prior to 1975, only *W*'s ordinary separate property was protected in this way. A supplier of necessities could reach all of *H*'s separate property with no distinctions drawn between ordinary separate property and quasi-community property. Compare the pre-1975 texts of §§ 5130 and 5132.

The new rule apparently is intended to protect to the extent possible the separate estates of both spouses by having family expenses (necessaries) first paid from property that the courts will view as community property at dissolution of the community.

A retroactivity problem can arise where a pre-1975 supplier of necessities under a contract made by *W* seeks, in the absence of community property, to reach ordinary separate property of *H* even though he owns quasi-community property. Since *H* has the power simply to pay that creditor with the quasi-community property, however, the question of whether *H* can quash a levy on his ordinary separate property will usually be academic.

A problem inherent in § 5132 that remains to be resolved is whether a necessities creditor under a contract with *W* can levy on *H*'s separate property (ordinary or quasi-community) even though *W* herself has separate property. See Comment, *supra* note 107, at 1014-15. The question is of particular importance in view of the holding in *See v. See*, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966), that a spouse is not entitled to claim reimbursement upon dissolution of the community for the expenditure of separate funds to support the community after community funds are exhausted. (Although *See* could possibly be limited to deliberate payment of family expenses with separate property and thus inapplicable where payment is involuntary, as a result of levy by the creditor. Cf. *Beam v. Bank of America*, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 1371 (1971)). Prior to 1975, § 5132 clearly provided that *W*'s separate property

These changes in the law raise yet another situation in which the prospectivity policies of section 7 of the clean-up legislation clash with policy favoring retroactivity whenever beneficial to creditors articulated in the first section of that legislation. Consider the following problem. In 1974, *H* is able to work but chose not to do so.<sup>175</sup> *H* and *W* live together and there is no community property. In late 1974, *H* buys \$1,000 worth of necessities (food, clothing, and essential furniture) on credit. In 1975 the seller seeks to collect on the debt, and the only marital property available is a large amount of separate property inherited by *W* before marriage and \$500 of quasi-community property *W* earned in a common law state before the couple moved to California.

If the debt were incurred by *H* in 1975, both types of *W*'s separate property could be reached, although she could apparently require the creditor to levy first on the \$500.<sup>176</sup> However, if the debt were incurred in 1974,<sup>177</sup> *W* has two defenses based on pre-1975 law. First, if the creditor invokes section 5132, *W* notes that in 1974 that statute made her separate property liable only if *H* was unable to work because of infirmity. Second, if the creditor invokes section 5121, *W* notes that in 1974 that statute made liable only separate property resulting from gift from *H* of transmutation. If the assumption is correct that section 7 of the clean-up Act applies to the first Act as well, *W*'s arguments make sense. Removing the exemptions given her by pre-1975 sections 5121 and 5132 certainly can be viewed as "affecting" the "transaction" in 1974 by which *H* incurred the debt. The fact that the legislature,

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was liable for necessities not contracted for by her only when *H* had no separate property. This was part of a statutory scheme that imposed a much greater support obligation on *H* than on *W*. When § 5132 was amended, the requirement that one spouse must have no separate property before the other is obligated to provide support from his or her separate property was eliminated.

Simple fairness indicates that now that the support obligations of *H* and *W* are the same (*i.e.*, *H* no longer must be infirm to be entitled to support by *W* when he has no separate property and there is no community property), the separate estates of *H* and *W* should both contribute to family expenses—either 50-50 or pro rata based on the amount of separate property owned by *H* and by *W*. But the duty to contribute should not bar the creditor from levying on whatever ordinary separate property he can find (when there is no community or quasi-community property). *See* Bingaman, *supra* note 14, at 221-25. Insofar as *See* prohibits a reimbursement claim when the creditor elects to levy on the separate property of one spouse alone, it must be overruled.

175. This meant that *W*'s separate property would not be liable for necessities purchased and consumed by *H* because under former § 5132, prior to 1975, *W*'s separate property was liable for support of *H* only if he was "unable, from infirmity, to support himself."

176. *See* note 174 *supra*.

177. At least to the extent it was for necessities consumed in that year—query the effect if half the items *H* bought were still available for support in 1975.

through retroactive amendment to Civil Code section 5116, gave creditors a windfall where *community* property formerly managed only by the nondebtor spouse is sought to be levied on does not mean the legislature had the same intent regarding liability of separate property under the necessities doctrine. One of the primary reasons given by the legislature for the retroactivity of amended Civil Code section 5116 was its belief that California should continue to adhere to the managerial system of creditors' rights.<sup>178</sup> That is, if the *debtor* spouse has the power to draw on certain property to pay his debt, the creditor can make him do so because the creditor dealt with his debtor in reliance on the debtor's status as the managing spouse.<sup>179</sup> This system does not apply when the supplier of necessities, by contract with *H*, seeks to reach *W*'s separate property. Indeed, the necessities doctrine that allows the creditor to do so is an *exception* to the managerial system of creditors' rights. If the intent is to adhere as closely as possible to the managerial system, the pre-1975 law should be applied to pre-1975 necessities contracts made by *H*, since the pre-1975 exception with respect to *W*'s separate property was very narrow—only separate property arising by gift from *H* or by transmutation was liable.

On the other hand, *H*'s 1974 necessities-creditor can find support for his position that Civil Code sections 5121 and 5132 are to be retroactive in favor of creditors in the following statement of policy in the fourth Act: "the extension of the liability of community property avoids undesirable preferences among creditors of the community."<sup>180</sup> The creditor may argue that the preference based on the date of the contract is equally as undesirable when separate property rather than community property is at issue. But since the quoted language appears in the same section of the fourth Act that is primarily a declaration of support of the managerial system of liability of marital property, and since the managerial system is of no aid to the creditor in the problem at issue, the prospectivity policy of section 7 is controlling. *W* keeps her pre-1975 exemptions. However, if the items *H* purchased in 1974 are being used in 1975 to discharge *W*'s duty under section 5132 to support *H*, it is arguable that the case involves a 1975 transaction or

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178. See text accompanying note 121 *supra*.

179. See *Grolemund v. Cafferata*, 17 Cal. 2d 679, 111 P.2d 641 (1941). For example, equal management allows *H* to spend *W*'s pre-1974 uncommingled earnings, formerly exempt from liability for *H*'s ordinary debts (*i.e.*, not for necessities). CAL. CIV. CODE § 5116 (West Supp. 1975) enables the creditor in effect to force *H* to exercise that power even with respect to pre-1975 contracts.

180. Ch. 1206, § 1, [1974] Cal. Stats. — (quoted in full in text accompanying note 121 *supra*).

act (discharging of *W*'s support duty) rather than a 1974 transaction (date of *H*'s purchase), in which event the creditor may be able to reach *W*'s separate property.

d. *Tort liability of community property*: Perhaps the most difficult retroactivity problem presented by the new laws adopted in the reform package arises from the amendment of Civil Code section 5122,<sup>181</sup> which relates to tort liability of community property. Prior to 1975, tort liability of community property was determined by ordinary principles of the managerial system.<sup>182</sup> In many pre-1975 families where *W* had no separate property (or had lost it by commingling) and did not work for wages (or commingled her wages with *H*-managed property), this meant the wife was judgment-proof in tort. While persons dealing with *W* in a contractual setting prior to 1975 could be viewed as deliberately taking the risk that there would be no *W*-managed property available to levy on if she breached her obligation, most tort victims of *W* could hardly be said to have deliberately taken a risk in dealing with her that she was judgment-proof.

This state of the law put great pressure on the courts to find that *W* committed the tort as *H*'s agent so that *H*-managed property became liable<sup>183</sup> and probably was considerably responsible for enactment of the owner-responsibility statute in California,<sup>184</sup> applicable in traffic accident tort cases.

The adoption of equal management in the reform legislation, giving *W* a right to use *H*'s earnings to pay tort obligations she incurs and giving the tort judgment creditor a concomitant right to levy on all the community property under ordinary managerial system principles, solved the problem. The victim of a post-1974 tort committed by either spouse can reach all the community property under Civil Code section 5122(b). In addition to echoing section 5116 (applicable to

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181. CAL. CIV. CODE § 5122 (West Supp. 1975).

182. This was codified by ch. 457, § 6, [1968] Cal. Stats. 1077, by a revision of § 171a of the Civil Code, and renumbered § 5122 by ch. 1608, § 8, [1968] Cal. Stats. 3341:

(b) the liability of a married person for death or injury to person or property may be satisfied only from the separate property of such married person and the community property of which he has the management and control.

183. See, e.g., *McWhirter v. Fuller*, 35 Cal. App. 288, 170 P. 417 (1918). In Louisiana, where the problem of the judgment-proof *W* is most extreme because she does not even control her own community earnings, agency concepts have also been stretched to permit a recovery. See *Brantley v. Clarkson*, 217 La. 425, 46 So. 2d 614 (1950) (*W* acting as agent for *H* while, unknown to him, driving to neighbor's to visit and borrow knitting needle).

184. CAL. VEHICLE CODE § 17150 (West 1971).



nontort obligations) by making all community property liable, the legislature introduced into tort liability law the Washington-Arizona<sup>185</sup> concept of "community" and "separate" torts in amending section 5122.<sup>186</sup>

185. See note 86 *supra*. Other significant cases applying the system are *Hirales v. Boegen*, 61 Ariz. 210, 146 P.2d 352 (1944) (joint separate tort by *H* and *W* makes community liable); *Payne v. Williams*, 47 Ariz. 396, 56 P.2d 186 (1936); *Kilcup v. McManus*, 64 Wash. 2d 771, 394 P.2d 375 (1964); *Gannon v. Robinson*, 59 Wash. 2d 906, 371 P.2d 274 (1962); *Bergman v. State*, 187 Wash. 622, 60 P.2d 699 (1936) (questioning whether there can be a community crime); *J.D. O'Malley & Co. v. Lewis*, 176 Wash. 194, 28 P.2d 283 (1934). Kahn and Frimmer, *supra* note 33, at 522, assume that § 5122(b) adopts the Washington-Arizona classification system, citing additional cases.

It should be noted, however, that California may reject some Washington-Arizona cases that stretch the concept of community debt or tort beyond reason. The Washington and Arizona statutes allow recovery of community property only when the tort occurs in the course of a community activity, whereas California will permit recovery of community property for a separate tort after the separate property of the tortfeasor spouse is exhausted. Washington and Arizona thus are under great pressure to find a debt or tort to be community because frequently the debtor or tortfeasor has no separate property. Particularly in the case of a tort victim, it seems unfair to permit the negligent spouse to live in luxury on community property while the victim recovers nothing due to the court's having found the tort to be "separate." See *Aichlmayr v. Lynch*, 6 Wash. App. 434, 493 P.2d 1026 (1972) (Green, J., concurring). Thus, in *Moffitt v. Krueger*, 11 Wash. 2d 658, 120 P.2d 512 (1941), where *W* incurred tort liability while on a beer-drinking binge with a man who, it seems clear from the report of the case, was her boyfriend, the rule that recreation is a community endeavor was applied and the automobile accident held a community tort. See also *Reed v. Loney*, 22 Wash. 433, 61 P. 41 (1900), extending the concept of community contract beyond reason. Since under § 5122 the designation of a community or separate tort does not determine whether the victim receives a worthless judgment but simply which property he or she should levy on first, the extreme Washington and Arizona cases should be rejected by California courts in favor of a more reasoned analysis of community benefits.

New Mexico cases defining a separate tort should also be considered with caution, since in that state the separate tort victim can reach but half the community property while the community tort victim can reach it all. N.M. STAT. ANN. §§ 57-4A-4, 57-4A-5 (1973).

186. CAL. CIV. CODE § 5122(b) provides:

The liability of a married person for death or injury to person or property shall be satisfied as follows:

(1) If the liability of the married person is based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the community property and second from the separate property of the married person.

(2) If the liability of the married person is not based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the separate property of the married person and second from the community property.

Note that this statute simply makes community property secondarily *liable* for a spouse's separate tort. It in no way eliminates the other spouse's right at dissolution of the community to a reimbursement claim where community property has been seized by the victim of the separate tort. See *Weinberg v. Weinberg*, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967). The reimbursement claim would be of real value if the tortfeasor spouse inherited separate property after the victim had levied on community funds.

Since the legislature in enacting § 5122(b) could easily have referred to "tort liability" rather than liability "for death or injury to person or property," it may be that lia-

Retroactivity problems are immediately apparent. Suppose *W* in 1974 committed a battery upon Ms. *X* under such circumstances that it could not even be colorably contended that *W* was acting as agent for *H*. In 1975 Ms. *X* obtains a \$20,000 judgment against *W*. There is no insurance<sup>187</sup> and *W* has no separate property and no community earnings or other property that was *W*-managed before 1975. Ms. *X* seeks to levy on savings from *H*'s community earnings. *H* objects, contending that amended section 5122 is prospective only and applies only to post-1974 torts, the time when the cause of action arises, not the time that a judgment is obtained, being controlling. *H* notes that *W*'s battery in 1974 was an "act or transaction" under section 7 of the clean-up Act and that to increase *H*'s obligation arising from that tort is to "affect" the pre-1974 "act" as prohibited by section 7.<sup>188</sup> He contends that only community property that would have been *W*-managed under pre-1975 law is liable, and, therefore, that only such property can be reached by Ms. *X*.

Ms. *X* in reply would invoke the legislature's policy statement at the beginning of the clean-up Act, noting that while it speaks of the "debts" of a spouse—perhaps not as broad a term as "liabilities," which

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bility for some torts is governed by § 5116 rather than § 5122. This could mean that community property might not be liable for an antenuptial tort treated as a "contract" under § 5116. CAL. CIV. CODE § 5120 (West Supp. 1975) exempts some community property from liability for "debts . . . contracted before the marriage." It seems obvious that the § 5120 exemption does not apply to liability for antenuptial "death or injury to person or property," since § 5122 is the only provision applicable in such a case.

The metaphysics of what is "injury" to "person" or "property" is happily beyond the scope of this Article. But some problems that may arise suggest that a clarifying amendment to § 5122 is needed. For example, does a judgment for libel or slander fall under § 5122(b)? A judgment for invasion of privacy? What of a judgment for alienation of affections or criminal conversation based, under choice of law principles, on the substantive law of a state other than California that is judged to have a greater interest in the action? (Such causes of action have been abolished in California substantive law. 26 CAL. JUR. 2d *Husband and Wife* § 104 (1956).)

187. If there were, another interesting retroactivity problem could arise. If *H* purchased the policy and paid the premiums up to the time of the accident in 1974 with *H*-managed post-1927 earnings, *H* would have had exclusive management and control of the policy, presumably, even if it insured against liability incurred by *W*. Could Ms. *X* in 1975 sue the liability insurer as subrogee of *W* after *W* failed to pay the judgment against her? Section 7 of the clean-up Act might bar the suit if it were necessary for Ms. *X* to assert *W*'s new equal management power in order to bring it as her subrogee. It would seem, however, that even before 1975, *W* and her subrogee could sue the insurer, not on the theory that *W* had any management power with respect to the policy but on the ground that the contract conferred on her the rights of a third party beneficiary (a peculiar third party beneficiary—neither a creditor beneficiary nor a donee beneficiary, since *W* owned half the money used to pay premiums).

188. See text accompanying note 122 *supra*.

would clearly include Ms. X's tort judgment<sup>189</sup>—the policy of adhering to the managerial system of creditors' rights is just as applicable to Ms. X's case as it is to the case of a contract creditor. Perhaps the legislature was thinking only of contractual liabilities in its declaration of policy, but it is difficult to imagine a reason for distinguishing and treating tort liability differently. If one set of creditors was deserving of a windfall<sup>190</sup> it was not contract creditors but W's pre-1975 tort judgment creditors who, as noted above, almost certainly did not, in putting themselves into a position where they could become her victims, deliberately take the risk that W would be judgment-proof. Ms. X is surely correct that the policies in favor of the basic equity of the managerial system of creditors' rights (*i.e.*, if W can, by law, voluntarily pay what she owes, the law makes her do so) and the policy against discrimination between creditors based on the date assigned to their cause of action are just as applicable, and perhaps more so, to tort creditors as to contract creditors. I cannot imagine why the legislature would want to benefit contract creditors by making amended Civil Code section 5116 retroactive but to withhold the same benefit from creditors who have suffered personal injury by making amended section 5122 prospective only. The failure of the legislature to address specifically the question of retroactivity of section 5122 as amended is probably an oversight. In the hypothetical, Ms. X should be able to reach by her 1975 levy all the community property.

That portion of section 5122 that distinguishes between community and separate torts also raises retroactivity problems of a quite different nature. Suppose that at the time W battered Ms. X in 1974,

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189. The Legislature further finds and declares that (1) the liability of community property for the *debts* of the spouses has been coextensive with the right to manage and control community property and should remain so; (2) the extension of the liability of community property for *obligations contracted* prior to January 1, 1975, does not impair the rights of creditors or the interests of the spouses in the community property; and (3) the extension of the liability of community property avoids the undesirable preferences among creditors of the community.

Ch. 206, § 1, [1974] Cal. Stats. — (emphasis added). See Note, *Community Property—Antenuptial Debts—Eliminating Immunity of Earnings and Accumulations of Debtor Spouse*, 45 WASH. L. REV. 191, 193-94 (1970).

190. Bonanno, *supra* note 36, at 101, called W's creditors "donee-beneficiaries" of the reform legislation even before CAL. CIV. CODE § 5116 (West Supp. 1975) was made retroactive to pre-enactment contract debts. The retroactivity provision of § 5116 is fairly called a windfall to creditors, since such retroactivity was not at all necessary to achieve the primary goal of the legislation—a system of community property that after its effective date would give women, as equal owners of community property, an equal opportunity to deal with it, and hence to be in a posture where no reason to deny a married woman credit after 1974 would exist.

there were on hand some uncommingled earnings of *W* (hence *W*-managed) and some separate property belonging to *W*. When Ms. *X* in 1975 seeks to levy execution on her tort judgment against *W*, these items are identifiable as to their pre-1975 characterization. Under pre-1975 law, Ms. *X* was free to levy on either *W*'s separate property or *W*'s uncommingled earnings.<sup>191</sup> There was no priority of liability. If *W*'s "separate" creditor levied on *W*-managed community property, *H* could not object and had no remedy until dissolution of the marriage by death or divorce, at which time the community could assert a claim for reimbursement against *W*.<sup>192</sup>

Suppose Ms. *X* in 1975 levies on *W*'s uncommingled community earnings. Undoubtedly *W*'s battery of Ms. *X* was an activity not "for the benefit of the community."<sup>193</sup> May *H* enjoin this levy and compel Ms. *X* to first exhaust *W*'s separate property on the ground that section 5122 retroactively supplies the remedies even in the case of pre-1975 torts?<sup>194</sup>

Since Ms. *X* is going to have her judgment satisfied one way or the other, the legislative policies of fairness to creditors are not directly relevant to this retroactivity question. *H* can argue, however, that since amended Civil Code section 5122 is retroactive in order to enable *W*'s pre-1975 tort creditor to reach *H*'s earnings, the section should be retroactive in toto. The burden on Ms. *X* in requiring her to levy first on *W*'s separate property<sup>195</sup> is miniscule, *H* would contend. And since the tort creditor substantially benefits by the new liability provisions of section 5122, Ms. *X* must be bound by its procedures.

Presumably, Ms. *X* could care less whether the injunction *H* seeks is granted; but *W*, however, may intervene to oppose it on the theory that the property Ms. *X* is levying on—*W*'s uncommingled earnings—was liable prior to 1975 so that the tort creditor is not invoking any benefits of the change in law that might carry with them the new procedures. Moreover, *W* would argue, section 7 of the clean-up Act is

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191. See note 182 *supra*.

192. See notes 87-92 and accompanying text *supra*.

193. See note 186 *supra*.

194. The matter is important to *H* if he and *W* are having marital difficulties, since *W*'s earnings are subject to his coequal management and control under § 5125, while her separate property is not.

195. As contended by Ms. Bingham in discussing New Mexico law, *supra* note 14, at 221-22, the creditor ought to be able to levy on any property that is liable until an objecting spouse locates for the creditor property that is primarily liable. If the levy on property primarily liable is more costly, this will not harm Ms. *X* since the judgment debtor's property will also be taken to pay the costs of execution.

directly applicable to the question of retroactivity of the liability priorities created in amended Civil Code section 5122. To hold that a levy executed to compel payment of liability under a 1974 tort is invalid under 1975 law is to "affect" a pre-1975 "act" (the tort), a result which section 7 forbids.<sup>196</sup>

Undoubtedly, this retroactivity problem is one that never occurred to the legislature. The courts must extrapolate from the general policies concerning retroactivity expressed in sections 1 and 7 of the clean-up Act in an effort to infer what the legislature would have wanted if it had considered the problem. If this is an impossible inquiry, the presumption of prospectivity controls, and *H* would be denied an injunction. A probable intent can be found, however. Section 7 is broader than the first section of the clean-up Act in that it is addressed to third parties in general who may be affected by the community property reforms, whereas the first section is addressed to third parties involved as creditors. Following the rule of interpretation that the specific prevails over the general, the first section's policy against discrimination between creditors based on the date of the transaction indicates that the new procedures of amended Civil Code section 5122 would apply to Ms. *X*'s levy in 1975.

In addition, there is simply no equity in *W*'s position, only the dry language of section 7. Pre-1975 case law recognizes the unfairness of using community property to pay a "separate" obligation of a spouse.<sup>197</sup> This is permitted in California only because it is deemed of paramount importance that creditors be paid, since rights between spouses *inter sese* can be adjusted by an accounting upon dissolution of the marriage. But Ms. *X* is going to be paid, and no reason appears to delay the adjustment of rights between the spouses until dissolution.

e. *Obligation of a spouse to support his or her relatives*: The first Act amended section 17300 of the Welfare and Institutions Code, pertaining to the rights of counties to claim reimbursement for welfare assistance given to a person's needy child, parent, or spouse. Reimbursement can be obtained only if the county board of supervisors determines that the welfare recipient's spouse, parent, or adult child was "pecuniarily able to support" the recipient at the time aid was given. Section 17300 was amended to provide that the only factors to be con-

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196. See text accompanying note 122 *supra*.

197. *Weinberg v. Weinberg*, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967); *Bare v. Bare*, 256 Cal. App. 2d 684, 692, 64 Cal. Rptr. 335, 340 (1967).

sidered in assessing *W*'s ability to reimburse the county are her earnings and separate property, while such factors will be ignored in assessing *H*'s ability to reimburse.<sup>198</sup> Assuming ordinary principles of the managerial system of creditors' rights were previously applied to determine what community property should be considered in assessing a relative's ability to pay support, the amendment decreases the amount of community property attributed to *W* and, in conjunction with Civil Code section 5125, increases that attributed to *H*. For example, absent the above-mentioned addition to section 17300, damages recovered by *W* in an action based upon her personal injury would have been attributed to her, not to *H*, under the relatives responsibility law, since they were subject to her management and control. Since *H* now has equal management of such community property and section 17300 provides that such funds are not to be attributed to *W*, the post-1974 law is a complete turnabout with respect to the attribution of such property. The same would be true of community property other than *W*'s earnings that *W* managed prior to 1975 under a contract with *H* (*e.g.*, an antenuptial agreement) giving her management power in her own right, not as *H*'s agent. As amended, section 17300 would not permit attributing such community property to *W*.

Retroactive application of the amendment to section 17300 could result in "affecting" a pre-1975 "act" (the payment of welfare by the county, giving it a claim for reimbursement). For example, suppose in early 1974 *W* was injured and received \$50,000 as compensation for lost wages because her injury rendered her unable to work again. *H* and *W* had no other assets of substance. Later in 1974 the county paid welfare to *W*'s needy mother and to *H*'s needy mother. Under pre-1975 law, *W* apparently would owe reimbursement, but *H* would not. To apply amended section 17300 when the county sues the spouses in 1975 would reverse the liability status of *H* and *W*—a good example of transaction-overturning retroactivity, precisely what section 7 of the clean-up Act prohibits. Thus, the amendment to section 17300 should be applied prospectively only.<sup>199</sup>

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198. CAL. WELF. & INST'NS CODE § 17300 (West Supp. 1975).

199. Several additional provisions of the first Act raise no retroactivity problems requiring extended analysis. Former CAL. CIV. CODE § 5102 was amended to reword the definition of community and separate property—with no substantive change. Section 5105 was amended to drop reference to male management. Section 5124, giving *W* prior to 1975 management of her uncommingled earnings and her personal injury damages, was repealed. However, as noted in text accompanying notes 126-46 *supra*, prereform law continues to govern management of property such as contract rights involving a continuing relationship with third parties. Thus, if *W* in 1974 consigned to

### 3. *Provisions of the Probate Code Reforms*

As noted above, there is no provision making the amendments to the Financial Code in the third Act prospective only.<sup>200</sup> Perhaps these changes were intended to be solely for the protection of banking institutions, enabling them, despite equal management, to refuse *W* the power to withdraw community money from *H*'s account and vice versa without risking liability to the aggrieved spouse. Whatever the intent, the effect is to create a big hole in the equal-management system. If *H* diverts community cash to a bank account in his name, *W*'s only remedy after 1974 seems to be to bring suit against *H* under Civil Code section 5125(e).<sup>201</sup> If *W* proves *H* had no good reason for utilizing the Financial Code provisions to cut off her equal management, the court should be entitled to order *H* to switch the funds to an account from which both spouses can make withdrawals.

Although prior to amendment the Financial Code provisions did not concern a case where community funds were placed in an account in *H*'s name alone, if the money deposited was *H*-managed, prior to 1975<sup>202</sup> former Civil Code section 5125 allowed the banking institution to disregard any attempted withdrawal by *W*. However, where *H* deposited in his name *W*'s uncommingled earnings, the Financial Code sections did not protect the bank from possible liability to *W* if she demanded the funds and was refused, despite her offer to prove that they were hers to manage under former section 5124. Assuming that pre-1975 law would actually recognize a damages claim against the bank

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*X* for sale some antiques *W* had bought with her uncommingled earnings, *H* could not terminate this agency relationship in 1975 despite equal management. See *Review of Selected 1974 California Legislation*, 6 PAC. L.J. 125, 303 (1975). Former CAL. CIV. CODE § 5113.5, which provided that when community property was placed in trust it remained community property, was amended to reflect that management powers of *H* and *W* are now equal, but no substantive change in the effect of § 5113.5 resulted. Section 5120 now exempts separate property and community earnings of both *H* and *W* from the other's antenuptial debts. Section 5120 formerly protected *H*, but *W* had similar protection under former §§ 5117 and 5121. Section 5131 was amended to provide that *W*, as well as *H*, is not obligated to support the other spouse when they live apart, in the absence of an agreement to the contrary. This does not increase *W*'s liability, since under former § 5132, *W* had to support *H* only when they were living together (and when he was too infirm to work). An amendment in the first act to CAL. WELF. & INST'NS CODE § 12101 (West 1972) never became effective because that section was repealed and replaced by CAL. WELF. & INST'NS CODE § 12351 (West Supp. 1974) before 1975.

200. See text accompanying notes 94-100 *supra*.

201. See text accompanying notes 128-43 *supra* concerning the good faith test of CAL. CIV. CODE § 5125(e) (West Supp. 1975).

202. See note 100 and accompanying text *supra* with respect to the effective date of the Financial Code amendments in the third Act.

by *W* in such a case, the policies of section 7 of the clean-up Act against transaction-overturning and property-taking retroactivity of the community property reforms would certainly apply insofar as the post-1975 sections preclude such an action. The defense expressly given the banking institutions by the amendments to Financial Code sections 851, 7601, and 11200 thus cannot apply to any cause of action arising in favor of *W* prior to 1975.

## II. CONSTITUTIONALITY OF RETROACTIVE AND PROSPECTIVE APPLICATION OF CHANGES IN COMMUNITY PROPERTY LAW MADE IN THE 1975 REFORM PACKAGE

Assuming the analysis in Part I is correct, there are four instances where the legislature intends provisions of the community property reform package to apply retroactively.

First, the equal management provisions of Civil Code sections 5125 and 5127 shall apply retroactively with respect to the spouses—to pre-1975 community property and its fruits—but not so as to affect any completed acts or transactions where there are continuing contractual or other relationships with third parties.<sup>203</sup> The constitutionality of such retroactive application may be tested by a husband<sup>204</sup> who contends that to deprive him of exclusive control of his pre-enactment earnings and property purchased therewith is to “take” his property and give it, or half of it, to *W*; that such a taking is not for the public benefit and thus invalid; and that, even if it were done for a public purpose, the compensation he receives—a share of management over *W*’s pre-1975 uncommingled earnings and personal injury damages—is inadequate. *H*’s pre-1975 creditors may also attack the constitutionality of retroactive application of section 5125, arguing for example that they did not require *H* to give them a security interest in the community personalty because they knew and trusted *H* as a careful manager who would not squander such property and relied on the prior law, which gave the loose-spending *W* no power over such property.<sup>205</sup>

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203. See text accompanying notes 119-46 *supra*.

204. The same contention can be made by *W* with respect to property over which she had exclusive management and control pursuant to former CAL. CIV. CODE § 5124.

205. *H*’s creditors ought to have standing so to contend only if the amount of community property that was or would have been *H*-managed prior to 1975 and available to them has decreased because *W*’s creditors have seized some of it. Moreover, if such a creditor could have levied on the *H*-managed community property before 1975, *i.e.*, before amended § 5116 allowed *W*’s creditors to reach the property as well, but due to



Such creditors would contend that to overturn their reliance on prior law violates due process.

Second, Civil Code sections 5116 and 5122, broadening the rights of pre-1975 contract and tort creditors, are to be fully retroactive.<sup>206</sup> The constitutionality of such application of the new law may be tested by the spouses. For example, *H* may contend that, while he was aware in 1974 that *W* was, by her contracts, going heavily into debt, he took no action to attempt to curtail *W*'s activity in reliance on the law insulating *H*-managed community property from *W*'s creditors; to change the law to permit *W*'s creditors to seize this property is a "taking" of *H*'s property for no public purpose and without compensation. In addition, the creditors of a spouse may attack the constitutionality of retroactive application of the provisions broadening creditors' rights. For example, in the above hypothetical *H*'s creditors may assert that they did not demand that *H* give them a security interest in *H*-managed property because, considering *H*'s own debts and the extent of *H*-managed community property in light of the pre-1975 immunizing of such property from the debts of a spendthrift *W*, *H* was a picture of financial good health and solvency. But now *H*'s creditors must divide the former *H*-managed community property with *W*'s pre-1975 creditors, and no creditor will be fully paid. In view of their reasonable reliance on prior law, the creditors would argue, retroactive application of Civil Code section 5116 violates due process.<sup>207</sup>

Third, Civil Code section 199 is to apply retroactively so that children of *W*'s prior marriage who are the beneficiaries of a pre-1975 modifiable judgment requiring monthly support payments by *W* can no longer reach—in addition to *W*'s community earnings of the second community—approximately half of the rest of the community property.<sup>208</sup> However, since it is given in this instance of retroactive applic-

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delay did not seize *H*-managed property before January 1, 1975, the courts ought to hold that the creditor lacks standing to raise this due process argument. Finally, if the debt of *H* was incurred after enactment of the clean-up legislation, the creditor could not rely on *H*-managed property being free from *W*'s creditors after December 31, 1974, at least if knowledge of the fourth Act is imputed to the creditor.

206. See text accompanying notes 120-27 *supra*.

207. Professor Bonnano, *supra* note 36, at 105, even found a retroactivity constitutional problem with the purportedly "prospective" version of § 5116 in the first Act providing that postnuptial creditors could reach all community property only with respect to contracts made on or after January 1, 1975. This would mean, he noted, that community property earned by *H* before 1975, when *W* could not obligate it, could be taken by *W*'s post-1974 creditors. The constitutionality of such a result can be raised both by *H* and his creditors.

208. See text accompanying notes 162-66 *supra*.

ation of the change of law that the judgment for the children is modifiable, if section 199 is applied only to *W*'s post-1974 support obligation, the result is the very kind of modification to which the judgment subjected the children. By its very terms a modifiable judgment confers no vested—unimpaired—right and the children could have no reasonable basis for reliance on the availability of half of *H*-2's earnings for their support.<sup>209</sup> Any claim that application of section 199 to post-1974 periods of support under a modifiable judgment is unconstitutional is so lacking in merit that further analysis seems unnecessary.

Fourth, Probate Code section 205 eliminates a spouse's right at death under *Weinberg v. Weinberg*<sup>210</sup> to have the deceased spouse's unpaid "separate" debts paid with the decedent's separate property (or decedent's half of the community property). This change is prospective insofar as it applies only to payment of debts of persons dying after June, 1975. It is retroactive in the sense that when, say *H* dies in October, 1976, owing \$5,000 alimony arrears to *W*-1, a portion of *W*-2's share of community property acquired before July 1, 1975, can be taken to pay this debt, and *W*-2 will have no reimbursement claim.<sup>211</sup>

The remaining provisions of the community property reform package apply prospectively. The failure to give retroactive effect to the change in the law is also subject to constitutional attack under the state and federal equal protection clauses. For example, a wife whose husband dies on June 28, 1975, may argue that to deny her the power under amended Probate Code section 203 to manage community real property during administration of *H*'s estate, while such a right is accorded a widow of a man who died 3 days later, is irrational and a denial of equal protection of the law.<sup>212</sup> A creditor supplying necessities

209. Not only does the modifiable nature of the judgment make reliance by the children on their ability to seize about half of *H*-2's earnings under CAL. CIV. CODE § 5127.5 (West Supp. 1975) unrealistic, there could be no assurance that *H*-2 himself would continue to produce community earnings. He might, for example, inherit considerable separate wealth, quit working, and provide for his own obligations out of separate rents and profits derived from his inheritance.

210. 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967); see notes 86-92 and accompanying text *supra*.

211. See text accompanying note 92 *supra*. This assumes that in fact CAL. PROB. CODE § 205 (West Supp. 1975) is construed to partially abrogate *Weinberg*. Conceivably, the courts will construe the statute in a way that eliminates the problem I find by interpreting the words of the statute, "chargeable proportionately," as directing only the initial mode of payment of the debts and not eliminating a reimbursement claim in favor of the surviving spouse under *Weinberg* that can be asserted after all the other debts of the decedent are paid.

212. This particular equal protection question probably will never be reached by the

in late 1974 to *H*, who is needy but not infirm, may argue that to deny him access to *W*'s separate property while opening up such property to another creditor who sold necessities to *H* in January 1975 is a denial of equal protection.

In the first three sections that follow, it will be demonstrated that retroactive application of those provisions in the reform package that the legislature intended to operate retroactively is not a denial of due process. The final section concludes that prospective application of the remaining provisions in the package probably does not deny equal protection of the law to anybody within the meaning of the state or federal constitutions.

A. THE LEXICON OF RETROACTIVITY CASES—THE MAGIC  
TERMS "VESTED" AND "PROPRIETARY"

Unconstitutionality of retroactive application of legislation is usually asserted on the basis of the due process clause of the fourteenth amendment (or due process and just compensation clauses of the fifth amendment where federal law is at issue) and any state constitutional equivalent of the due process clause. The federal constitutional provision against impairment of contracts has also been invoked in retroactivity cases.<sup>213</sup>

But whichever of these constitutional provisions is asserted, the approach of the courts in cases involving constitutionality of retroactive

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courts because *W* will be entitled to the relief she seeks due to the unconstitutionality arising from the sex discrimination in prereform CAL. PROB. CODE § 203. See text accompanying notes 102-05 *supra*.

213. U.S. CONST. art. I, § 10; accord, CAL. CONST. art. I, § 16. See Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960) [hereinafter cited as Hochman], and Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216 (1960) [hereinafter cited as Slawson] for cases applying the federal clause. Retroactivity cases decided under the state impairment-of-contracts clause are not as numerous. A recent example is *Frazier v. Tulare County Bd. of Retirement*, 42 Cal. App. 3d 1046, 117 Cal. Rptr. 386 (1974). See also *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30 (1971).

In cases involving purported retroactive application of statutes affecting English common law property brought into California, the privileges and immunities clause of U.S. CONST. art. IV, § 2, has been applied. See, e.g., *In re Estate of Thornton*, 1 Cal. 2d 1, 33 P.2d 1 (1934). However, in these cases the privileges and immunities clause became an issue because of an alleged taking of property at the time of a change of domicile, not, as in retroactivity cases, at the time a new law is enacted and applied to pre-enactment events or property. The privileges and immunities clause is not directly involved in considering the validity of retroactive application of the statutory changes that became effective January 1 or July 1, 1975.

application of statutes is basically the same:<sup>214</sup> if retroactivity is reasonable under all the circumstances, no constitutional violation will be found.

The analysis of reasonableness of retroactive application of a new statute is essentially a broad, ad hoc weighing or balancing process.<sup>215</sup> On the one side are: (1) whether reliance on prior law by the party affected by retroactivity was reasonable; (2) the extent of actions taken by the party on the basis of such reliance, such as financial investments, an irremeable course of conduct, and so forth; and (3) the extent of impairment or disruption of that investment or course of conduct resulting from retroactive application of the change of law. If reliance on pre-enactment law was reasonable, investments of great value were made on the basis of such reliance, and retroactive application completely destroys the value of such reliance, the strongest case supporting unconstitutionality of retroactive application of the change in the law is made. On the other side of the balance the court weighs: (1) the importance of social policies underlying the new enactment, including the gravity of the social evil sought to be corrected; and (2) the extent to which retroactivity of the new law, as opposed to prospectivity, is necessary to achieve the legislature's social policies. If a serious injustice that can only be eliminated by retroactive application of the new law is found to have existed, the strongest case for constitutionality of retroactivity exists.

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214. For example, the opinion in *Frazier v. Tulare County Bd. of Retirement*, 42 Cal. App. 3d 1046, 117 Cal. Rptr. 386 (1974), would not have been written any differently had the due process clause been the constitutional provision cited to rather than the impairment of contracts clause. See Hochman, *supra* note 213, at 695; Slawson, *supra* note 213, at 221.

215. The balancing test is well explained in the influential article by Hochman, *supra* note 213. Hochman's formulation has been followed in several California cases. See *Loop v. State*, 240 Cal. App. 2d 591, 598, 49 Cal. Rptr. 909, 914 (1966); *Flournoy v. State*, 230 Cal. App. 2d 520, 532, 41 Cal. Rptr. 190, 198 (1964). Cf. *Peterson v. City of Minneapolis*, 285 Minn. 282, 288, 173 N.W.2d 353, 357 (1969). The same or a similar "reasonableness" formulation of the constitutional standard in the United States Supreme Court cases is found by almost all scholars who have analyzed them. See, e.g., Hochman, *supra* note 213; Slawson, *supra* note 213; Smith, *supra* note 42. This approach can readily be applied in community property retroactivity cases. See, e.g., Armstrong, "Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?, 33 CALIF. L. REV. 476, 495-96 (1945) [hereinafter cited as "Prospective" Application]; Knutson, *California Community Property Laws: A Plea for Legislative Study and Reform*, 39 S. CAL. L. REV. 240, 268 (1969) [hereinafter cited as Knutson]; Note, *Retroactive Application of California's Community Property Statutes*, 18 STAN. L. REV. 514, 521-23 (1966) [hereinafter cited as *Retroactive Application*].

If the impairment of pre-enactment rights is sufficiently severe, no degree of public harm prevented by retroactive application of a statute can constitutionally justify the impairment without compensation.<sup>216</sup> Thus, if the scales on the first side of the balance are heavily weighted by a strong case of injustice to the individual, the state usually cannot tip the scales in its favor by even the strongest case of harm to the public.

Especially in older cases, this broad inquiry with respect to reasonableness is often obscured by the language of the opinions. It is almost as if the judges considered it unseemly for the law to be flexible, to lack more firm rules governing retroactivity cases. What the older opinions often discussed was whether vested or proprietary rights were taken by a change in the law. If the labels "vested" or "proprietary" were applied by a court, retroactive application of the new law was held unconstitutional. However, studies of the older cases make it clear that in most of them the judges understood that the terms "vested" and "proprietary" were simply legal conclusions that attached only after reasonableness of a retroactive change in the law was analyzed—at least in the secrecy of the conference room. Instances where it appears that the courts became mesmerized by the labels "vested" or "proprietary" and plugged them in as a shortcut to analysis are few. Most contemporary courts are quick to recognize expressly that the terms "vested" and "proprietary" are nothing more than legal conclusions to be applied to pre-enactment rights or expectations of a party only after analysis of the reasonableness of retroactivity of an act under all the circumstances convinces the court that retroactive application was indeed unreasonable.<sup>217</sup>

In California, the meaning of the term "vested" in retroactivity cases became confused in 1966 after the decision in *Addison v. Addison*.<sup>218</sup> The court there stated that some "vested" rights can be taken

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216. See, e.g., Slawson, *supra* note 213, at 249; Smith, *supra* note 42, at 241.

217. County of Los Angeles v. Superior Court, 62 Cal. 2d 839, 844, 44 Cal. Rptr. 796, 799, 402 P.2d 868, 871 (1965) ("describing a right as 'vested' is merely conclusory"). See also Coast Bank v. Holmes, 19 Cal. App. 3d 581, 594, 97 Cal. Rptr. 30, 37 (1971) (whether statute can be given retroactive effect does not rest on distinction between procedure and substance but on whether statute alters legal effect of past transactions); Estate of Gill v. Hagny, 19 Cal. App. 3d 496, 501, 96 Cal. Rptr. 786, 789 (1971) (whether rule of law is labeled substantive or procedural is not helpful in determining whether a statutory amendment constitutionally may be given retrospective application; rather it is its effect which is decisive of the question).

218. 62 Cal. 2d 558, 566, 399 P.2d 897, 902, 43 Cal. Rptr. 97, 102 (1965): "Vested rights, of course, may be impaired 'with due process of law' under many circumstances."

or impaired constitutionally through retroactive application of a statutory change of law by virtue of the state's police power. No longer does the term signify to California judges a conclusion that the rights and expectations are such that, weighing all the circumstances, their impairment by retroactive application of the new statute would be unreasonable. Rather, after the *Addison* decision in California, the term "vested right" in retroactivity cases seems to signify that the party objecting to retroactivity has come forward with facts that put sufficient weight on that party's side of the scales that the court must engage in the weighing process.

Because it is helpful to the analysis of retroactivity problems to be able to draw on conclusory terms that characterize a particular type of retroactivity case, and since the term "vested right" has never had a clear meaning in the law<sup>219</sup>—and in California now seems to mean one thing in older cases and something quite different in contemporary judicial opinions—a more discriminating retroactivity lexicon should be developed. For purposes of this Article, retroactivity cases are characterized as follows:

#### 1. *Freely Impairable*

This term describes benefits, rights, or privileges (the label here is unimportant) that a party enjoyed under pre-enactment law which, by their nature and in light of the history of legislative authority in this country, must be viewed as subject to change and adjustment at the discretion of the legislature. Any reliance on the continuation of pre-enactment law by the objecting party is per se unreasonable. The party has nothing, therefore, to place on his side of the balancing scales, and retroactive application of the law must be held constitutional unless it is so arbitrary and senseless in light of the social purposes of the legislature that it denies due process. What was described in Part I as "privilege-regulating" retroactivity will usually involve freely impairable rights of a party. For example, no American can reasonably believe, when he purchases real property, that tax rates will remain at the then-existing level. And even if a wealthy man without a will is incurably insane, his uncle, as heir presumptive under a gradual system of descent, cannot assume that the legislature will not, before the intestate dies, convert to a parentelic system of inheritance in which a grand-nephew would become the heir.

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219. See Smith, *supra* note 42, at 231.

## 2. *Unimpairable*

At the other end of the continuum of retroactivity cases from those involving freely impairable pre-enactment rights are cases where injustice to the objecting party is so apparent by retroactive application of the law that no social policies of the legislature could constitutionally justify the impairment of that party's rights without compensation. A good example of a violation of unimpairable rights would be a conservation measure prohibiting the state from selling coastal lands to private parties. It is obvious that thousands of persons claim coastal lands under chains of title traced back to patents issued by the state (or other conveyances by the state), that such persons will have relied on their titles being good, will have spent considerable funds purchasing and improving coastal properties, and will lose their entire investment if the new law is applied retroactively to upset ancient grants by the state. There is no occasion for balancing of interests, and retroactive application of the law must be held to deny due process. Retroactivity cases involving unimpairable rights will be few and will usually involve what I have termed property-taking and transaction-overturning retroactivity.

## 3. *Impairable on Balance*

This category probably embraces the bulk of litigated retroactivity cases. For a right to be impairable on balance, there must be at least some reasonable reliance by the objecting party on pre-enactment law, some change of position by that party based on such reliance (*e.g.*, a contract is made, money is spent, an opportunity to act is foregone), and some loss of benefits already obtained or reasonably anticipated resulting from retroactive application of the statutory change. On the other hand, examination of these factors does not present a case of such patent injustice that the harm caused to the objecting party by retroactive application of the statute could not be outweighed by the interest of the state in the exercise of its police power to benefit all the people by eliminating a perceived social evil. Thus the courts must balance the harm to the objecting party against the gravity of the evil sought to be corrected by the legislature and the extent to which retroactivity of the statute is necessary to eradicate that evil.<sup>220</sup> This category of

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220. With respect to the importance of the latter consideration, see *Thorpe v. Housing Authority*, 393 U.S. 268 (1969); *Hochman*, *supra* note 213, at 701-02. In addition, if the anticipated benefits from the action taken in reliance are themselves speculative, if the action in reliance involved no financial cost, or if the pre-enactment law relied on constituted an "insubstantial equity," the balance is weighted in favor of finding retroactive application of the statutory change to be constitutional. *Id.* at 717, 720, 725.

cases involving rights retroactively impairable on balance will include most instances of transaction-regulating retroactivity and some instances of property-taking and transaction-overturning retroactivity. A statute prohibiting a creditor from seizing security after default without first giving the debtor an opportunity for hearing, even though immediate seizure was permissible under prior law and agreed to in the contract between the parties, would be a good example of a case where balancing of interests is necessary to decide the constitutionality of applying the law to pre-enactment debtor-creditor relationships.<sup>221</sup>

## B. CONSTITUTIONALITY OF RETROACTIVE OPERATION OF THE EQUAL MANAGEMENT PROVISIONS

### 1. *The Course of Legislative Changes in Management and Control*

The reform legislation that gives *W* equal management along with *H* of all community property makes the most radical change in principles of community property management and control in the history of California community property legislation. When the state constitutional convention in 1849 chose to continue the Spanish-Mexican system of marital property law in effect in California before its separation from Mexico,<sup>222</sup> it adopted a system of exclusive male management.<sup>223</sup> Sub-

221. *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30 (1971), is a recent California case where the court for the most part applied the reasonableness test to uphold transaction-regulating retroactivity. The statute at issue applied to contracts entered into before its enactment and gave some parties an additional remedy by providing that if there was an attorneys' fees clause for the benefit of one party it applied to the other as well.

222. See BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER 1849, at 257-69 (1850) [hereinafter cited as BROWNE]. The Constitution of 1849 in § 14 of article II provided:

All property, both real and personal, of the wife, owned or claimed by her before marriage, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property to *that held in common with the husband* . . . (emphasis added).

It seems clear from the debates that by this italicized language it was intended to adopt a community property system of marital property.

223. See W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 113 (2d ed. 1971) [hereinafter cited as PRINCIPLES]; 1 FEBRERO MEJICANO tit. II, capitulo X, § 20 (1834). There were several exceptions, however, which California cases have never noted. *W* could make moderate gifts of community-owned food to paupers, could give community money to a person suffering extreme hardship who would die if not given aid, and could exercise control over sums her marriage contract designated as pin money (*afileres para vestidos*). *Id.* § 19.

The first legislature enacted that "[t]he husband shall have the entire management and control of the common property, with the like absolute power of disposition as of of his own separate estate." Ch. 103, § 9, [1849-50] Cal. Stats. 254.



sequently, the legislature has been slowly chipping away at *H*'s exclusive control.<sup>224</sup> The series of statutes were:

- 1891 *H* prohibited from making a gift of community property without *W*'s written consent.<sup>225</sup>
- 1901 *H* prohibited from encumbering or selling household furnishings without *W*'s written consent.<sup>226</sup>
- 1917 *W* must join in any instrument whereby community realty is encumbered or conveyed.<sup>227</sup>
- 1951 *W* is given exclusive control of her earnings so long as they are not commingled with *H*-managed property; *W* is also given control over her community property personal injury damages.<sup>228</sup>
- 1971 *W* can manage half of the community property ordinarily managed by *H* to the extent necessary for *W* to support children of her prior marriage.<sup>229</sup>

Now, in 1975, *H* is deprived of his right to determine alone how his own earnings will be spent (at least if not retained in his business).

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Section 172 was amended in the Civil Code of 1891 to provide: "The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate." Ch. 220, § 1, [1891] Cal. Stats. 425.

224. See generally *Retroactive Application*, *supra* note 215.

225. Ch. 220, § 1, [1891] Cal. Stats. 425, amending § 172 of the Civil Code.

226. Ch. 190, § 1, [1901] Cal. Stats. 598, amending § 172 of the Civil Code.

227. Ch. 583, § 2, [1917] Cal. Stats. 829, enacting § 172a of the Civil Code.

228. Ch. 1102, § 1, [1951] Cal. Stats. 2860, enacting § 171c of the Civil Code. It was amended in minor respects by ch. 2334, § 2, [1957] Cal. Stats. 4066 and ch. 458, § 2, [1968] Cal. Stats. 1080. See note 395 *infra*.

The 1957 amendment removed a clause allowing *H* to draw on *W*'s community property personal injury damages to pay expenses incurred by *W*'s injury. The 1968 amendment restored this power to *H* and made it clear that *H* could not only draw on the personal injury damages to pay expenses but also to reimburse his separate estate and the community property subject to his management for expenses already paid from them related to *W*'s accident. Probably the 1957 amendment was intended not to apply to pre-enactment acquisitions, since it accompanied legislation that limited the concept of community property personal injury awards by making much tort recovery separate property. California reverted to the rule that personal injury recoveries are community property in 1968.

229. Ch. 578, § 8.6, [1971] Cal. Stats. 1137, enacting § 5127.5 of the Civil Code. The half of the community property over which *W* was given this limited management power was calculated after deducting sums owed by *H* as support obligation and \$300 of *H*'s income per month.

Section 5127.5 replaced CAL. WELF. & INST'NS CODE § 11351. Ch. 1784, § 5, [1965] Cal. Stats. 4011, as amended ch. 1417, § 1, [1969] Cal. Stats. 2903. Section 11351 stated that *W*'s half of the community property was liable for the support of her children of a prior marriage. However, in *People v. Lockett*, 25 Cal. App. 3d 433, 102 Cal. Rptr. 41 (1972), the court stated that § 11351 "abridged" *H*'s management and control.

*W* can race into control and spend them before he does. This seems a far greater impairment of *H*'s rights and powers with respect to pre-enactment community property acquisitions than the 1891 statute which limited his power to make gifts, the 1901 act which limited his power to deal with household furnishings, and the 1917 act, which gave *W* no more than a veto power over conveyances and encumbrances of community realty. Yet the California courts have held that to apply the 1891, 1901, and 1917 changes in the law of management and control to pre-enactment acquisitions would be an unconstitutional violation of due process.<sup>230</sup> Does it not follow that the equal-management provisions of Civil Code sections 5125 and 5127 constitutionally may not apply to pre-1975 acquisitions, notwithstanding the legislature's contrary intent? The answer is an emphatic "no." A true system of community property did not exist in California when the statutes of 1891, 1901, and 1917 were enacted. Because the California Supreme Court misunderstood the writings of an 18th-century Spaniard, Josef Febrero, the marital property system in California prior to July 20, 1927, is more accurately described as one of forced heirship. What the courts erroneously called "common" or "community" property was actually held to be owned entirely by *H*. *W* was a forced heir as to one half.<sup>231</sup> The acts of 1891, 1901, and 1917 did not operate on a true community property system by distributing management rights between two co-owners of property. Instead, these statutes attempted to protect the expectant rights of a forced heir, and the constitutionality of their retroactive application was tested as such.<sup>232</sup>

The great majority of California couples—those who married after July 29, 1927, when a real community property system was adopted in California—have never lived under the forced-heirship marital property system. With respect to post-1927<sup>233</sup> community property, the equal management provisions effective January 1, 1975, are not statutes giving protective rights to *W* as a forced heir but confer rights as an equal owner. That this must have a significant effect on the reasonableness analysis applied in cases testing the constitutionality of retroactive application of statutory changes seems obvious. It smacks of reasonableness to give an equal owner equal control; whether it is reasonable to give an heir presumptive, even a forced heir, a veto power over

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230. See text accompanying notes 259-86 *infra*.

231. See 1 B. ARMSTRONG, CALIFORNIA FAMILY LAW 585 (1953) [hereinafter cited as ARMSTRONG].

232. See text accompanying notes 259-93 *infra*.

233. See note 40 *supra*.

nonfraudulent gifts of property as was done in 1891<sup>234</sup> is debatable. To give the forced heir a veto power over nonfraudulent sales and encumbrances of furniture and realty made for a valuable consideration is absurd. Thus, the previous California cases on the validity of retroactive changes in management and control law really have little bearing on the constitutionality of the retroactivity provisions of Civil Code sections 5125 and 5127 with respect to post-1927 acquisitions.

## 2. *Adoption by California Courts of a Forced-Heirship Theory of "Community" Property Ownership*

a. *The Spanish heritage:* A close study of the history of community property in California is essential to understanding the broad significance of the 1927 statute, which provided that the interests of both spouses in community property are "present, existing, and equal."<sup>235</sup>

Community property comes to California, of course, from Spain and Mexico. Most scholars who have written on the Spanish system took the view that *H* and *W* were equal owners by halves of community property.<sup>236</sup> The fact that *H* had exclusive management had nothing to do with ownership. The Spanish writers often analogized to partner-

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234. Even prior to the 1891 statute attempting to prohibit unilateral gifts of community property by *H*, *W* was given relief against "fraudulent gifts" by *H* (*Lord v. Hough*, 43 Cal. 581 (1872); *Smith v. Smith*, 12 Cal. 216 (1859)), although, as is still the case in Louisiana today, she might have to wait until dissolution of marriage to sue *H* or his donee. See *Greiner v. Greiner*, 58 Cal. 115, 8 P. 119 (1881).

The problem in pre-1891 case law was that contrary to the statement of law formulated in *Smith* and *Lord*, some of the California cases indicated that to obtain relief *W* must prove actual fraud by *H* in making the gift—an intent to injure *W*—rather than simply constructive fraud, as under Spanish law (*i.e.*, under all the circumstances, the gift is too large to be fair to *W* despite no anti-*W* animus by *H*). See *de Godey v. de Godey*, 39 Cal. 157, 164 (1870) (dictum); *Peck v. Brummagim*, 31 Cal. 440, 447 (1866) (dictum); *Fuller v. Ferguson*, 26 Cal. 546, 567 (1864) (dictum). The Spanish rule is explained and applied in *Givens v. Girard Life Ins. Co.*, 480 S.W.2d 421 (Tex. Civ. App. 1972), *writ refused* (no reversible error). Certainly the 1891 statute would have been reasonable and could have applied retroactively if all it did was to make clear that the courts were, as in *Lord*, to apply the reasonableness or constructive fraud test of validity of gifts of community property made by *H* alone.

The 1891 statute appears to be an overreaction to *Fuller*, *Peck*, and *de Godey*.

235. See note 40 *supra*. The full text of the 1927 act was:

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

Ch. 265, § 1, [1927] Cal. Stats. 484.

236. See *PRINCIPLES, supra* note 223, § 97.

ship law, and indeed, insofar as ownership is concerned, a true community of property is like a limited partnership between *A* and *B*, where *A* (husband) is managing partner and *B* the limited partner.<sup>237</sup> If their contributions are equal, they own partnership gains equally, even though *B* can in no way deal with the partnership property until the partnership is dissolved. Spanish law made no attempt to quantify the value of the contributions to the marital partnership of *H* and *W*. Instead, they were treated as equals; so a 50-50 limited partnership resulted.

The equal-ownership theory was expounded in treatises by Spanish lawyers and scholars in the 16th through 19th centuries. These works were usually very lengthy, detailed, and in Latin,<sup>238</sup> and few copies of them were brought to the New World by Spanish settlers. Rather, the most common Spanish law treatise in the new world seems to have been Febrero's *Libreria de Escribanos*,<sup>239</sup> which was shorter, in Spanish, and not written for legal scholars but for "notarios"—officials who were not lawyers but performed functions of notaries and some of the functions assigned today to court clerks and magistrates. Febrero, himself a notario and not a lawyer,<sup>240</sup> provided them with a general summary of the law.

Febrero's chapter on community property is brief. At several places he states the generally accepted view that community property was owned equally by *H* and *W*.<sup>241</sup> Occasional passages seem inconsistent, however:

Revocable and constructive possession and ownership in "habito y potencia"<sup>242</sup> in one half of the properties earned and acquired during marriage with her husband is transmitted and transferred to the

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237. *Id.* § 95.

238. PRINCIPLES, *supra* note 223, § 98.

239. J. FEBRERO, *LIBRERIA DE ESCRIBANOS* (1789-90). First published in Madrid, the "LIBRERIA" went through numerous editions and revisions, and soon became known simply as FEBRERO, after the author.

240. PRINCIPLES, *supra* note 223, § 98.

241. *E.g.*, the FEBRERO MEJICANO, an 1834 revision of the *LIBRERIA* edited by Eugenio Tapia and published in Mexico City, states in the first section in the chapter on community properties that they "belong to both spouses" (son propios de entrambos conyuges). 1 FEBRERO MEJICANO, tit. II, capitulo X, § 2 (1834) [hereinafter cited as FEBRERO MEJICANO]. Translations in this Article of Febrero are by myself, Benito H. Diaz, and Carol Richmiller.

242. *En habito* seems related to *habere*, "to have," indicating an ownership interest. *Potencia* indicates that *W*'s interest is limited during marriage but has the potential to ripen into perfect ownership of her half of the property if she survives *H*. See PRINCIPLES, *supra* note 223, § 100.

wife. After the husband dies, it is transferred to her irrevocably and actually so that by misfortune of his death she becomes the manager-owner, with absolute title and possession, of the half of the property remaining to her, in the same manner that the law treats conventional partnership.<sup>243</sup>

Even before dissolution of the marriage, the husband is the real and true manager-owner of all community property, because during the marriage he has in effect an irrevocable ownership. Therefore, he can manage the community properties, trade them, and . . . sell and alienate them at his will, absent a deceitful intent to defraud his wife . . . . So long as the husband lives and the marriage is not annulled and there is no legal separation, the wife should not say that she holds [*tiene*] community property, nor may she hinder the lawful use by the husband of that which he acquires on the pretext that the law grants her one half—for this grant is applicable in the stated instances [*e.g.*, *H's* death or annulment] and no others.<sup>244</sup>

Febrero's treatise first influenced development of community property law in the United States in Louisiana. For example, it is known from the notes of a draftsman of the Louisiana Civil Code of 1808 that Febrero was the source of many articles in that code concerning community property.<sup>245</sup> Febrero's influence on the issue of the nature of *H's* and *W's* ownership rights in community property first appeared in *Guice v. Lawrence*,<sup>246</sup> decided in 1847. *H* had surrendered community realty to a trustee for benefit of his antenuptial creditors. *H* soon died, and *W* sued to recover half of the value of the realty contending that because *W* was half owner *H* could not utilize her half interest to pay his separate debts that had not benefited the community. The Louisiana Supreme Court, paraphrasing the above-quoted passages from Febrero, rejected *W's* position. Until dissolution of the marriage, *W* did not have any title to community property. During marriage, *H* was the real manager-owner (*dueño*). *H* thus was entitled to turn over the community realty to the trustee as he had done. The *Guice* court

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243. FEBRERO MEJICANO, *supra* note 241, § 19.

244. *Id.* § 20.

245. See A REPRINT OF MOREAU LISLET'S COPY OF A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS [THE DE LA VERGNE VOLUME] (1968); Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 1, 12 (1971); Dainow, *Moreau Lislet's Notes on Sources of the Louisiana Civil Code of 1808*, 19 LA. L. REV. 43, 45 (1958).

246. 2 La. Ann. 226 (1847). *Guice* was overruled in *United States Fidelity & Guar. Co. v. Green*, 252 La. 227, 210 So. 2d 328 (1968); however, its holding was revived in *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973).

also reiterated Febrero's warning that *W* must not during marriage interfere with *H*'s control by asserting that she "has" (the court's translation of *tiene*) community property.<sup>247</sup> However, the holding of *Guice* is merely that *H*, as manager, could properly use community property to pay all his debts.

In a recent decision, *Creech v. Capitol Mack, Inc.*,<sup>248</sup> which approved the result in *Guice*, the Louisiana Supreme Court made a more careful analysis of Febrero's treatise on the issue of *W*'s ownership rights. *W* did have an ownership interest (*dominio*, as used by Febrero) greater than an heir's right to inherit, held the court. But that ownership was not coupled with power of use of the property, since *H* was the sole manager. As *W* could not apply her ownership interest to pay her debts, community property was not part of her patrimony. The *Creech* court concluded that the civil law concept of imperfect ownership described *W*'s interest. The closest common law analogy would seem to be vested ownership of a beneficial interest in trust, not a common law expectancy.

Perhaps due to the importance accorded Febrero in early Louisiana decisions, his treatise became standard reference material in early California cases. It was cited repeatedly in the first California community property case, *Panaud v. Jones*,<sup>249</sup> decided in 1851. The issue was whether, when *W* died before *H*, she had an interest in the community property that could pass to her heirs. No, held the court, because according to Febrero, *W*'s "dominion" (*dominio*—more properly translated as ownership) was "revocable and feigned" until dissolution of the marriage by *H*'s death. During marriage, the court went on, *H* had true dominion of the community property.<sup>250</sup> The *Panaud* court did not call *W*'s interest an expectancy.

*Panaud* was followed by California decisions reciting the generally accepted theory that *H* and *W* were equal owners of community property.<sup>251</sup> Then, in 1860, Chief Justice Field wrote the court's opinion in *Van Maren v. Johnson*.<sup>252</sup> The issue was whether community funds were liable for *W*'s antenuptial debts. Citing *Guice*, the court declared:

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247. 2 La. Ann. at 228.

248. 287 So. 2d 497 (La. 1973).

249. 1 Cal. 488 (1851).

250. *Id.* at 515-16.

251. See *Beard v. Knox*, 5 Cal. 252, 256 (1855); *Kashaw v. Kashaw*, 3 Cal. 312, 322 (1853).

252. 15 Cal. 308 (1860).

[T]he common property is not beyond the reach of the husband's creditors existing at the date of the marriage, and the reason is obvious; the title to that property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a *mere expectancy*, like the interest which an heir may possess in the property of his ancestor.<sup>253</sup>

The court then held that, since *W*'s position was like that of an heir, the English common law of coverture was controlling. Since *W* was considered merged into *H* by coverture, all of *H*'s property not exempt by statute was liable for *W*'s antenuptial debts.<sup>254</sup>

The "mere expectancy" characterization of *W*'s interest was applied again the next year in *Packard v. Arellanes*.<sup>255</sup> The court said that "[t]he same doctrine prevails in Louisiana, and appears to be an established principle of the civil and Spanish law."<sup>256</sup> The passage from *Guice* giving Febrero's views was quoted as support for this notion.<sup>257</sup>

Nothing in *Guice* or Febrero supports the California court's characterization of *W*'s interest as a "mere expectancy." A civilian would not have used this English common law term associated with dower. And, as pointed out in the Louisiana court's recent decision in *Creech*, not only is the notion of sole ownership by *H* completely at odds with the term "common" or "community" property,<sup>258</sup> but Febrero himself, who gets blamed for the mere-expectancy theory, stated that *W* indeed has some ownership (*dominio*) in the community property, although she could not invoke it to interfere with *H*'s management.

b. *Spreckels and its progeny*: Nevertheless, several years before the legislature began cutting back on *H*'s management powers so that the question could even arise whether retroactive application of the statutory change to pre-enactment acquisitions was unconstitutional, California cases had held that during marriage *H* was the sole and absolute owner of what the court erroneously still called common or community property. *W*'s interest therein was a "mere expectancy," like that of an heir.

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253. *Id.* at 311 (emphasis added).

254. *Id.* In so applying English law the court forgot that the state constitution referred to a system of "common" property and that it was clear from the debates (*see BROWNE, supra* note 222) that California had adopted through its constitution a Spanish rather than English system of marital property law.

255. 17 Cal. 525, 539-40 (1861).

256. *Id.* at 538.

257. *Id.* at 538-39.

258. 287 So. 2d at 507.

Whether this characterization of *W*'s interest was correct was the primary issue litigated in the first retroactivity decision, *Spreckels v. Spreckels*,<sup>259</sup> decided in 1897. Mrs. Spreckels, joined by her husband, sued to set aside a gift of community property he had made in 1893. In 1891 the legislature had amended former Civil Code section 172 to require *W*'s consent in writing to validate all gifts of community property made by *H*. The court assumed from the pleadings that the community property Mr. Spreckels had given away in 1893 had been acquired by him prior to enactment of the 1891 legislation.<sup>260</sup>

The court began by declaring that to determine whether application of section 172 to pre-enactment property was unconstitutional, it was necessary to consider what the rights of *H* and *W* were at the date of the statute's passage.<sup>261</sup>

[U]pon the death of the husband the wife takes one-half of the community property as heir . . . .

. . . .

Prior to the amendments of 1891 the code vested in the husband, with reference to the community property, all the elements of ownership, and in the wife none . . . .

. . . .

. . . the husband is the absolute owner of the community property . . . .

. . . [The Civil Code] gives to the husband complete legal ownership of the community property . . . and confers upon the wife no element of ownership whatever.<sup>262</sup>

These conclusions were supported by quotations from *Panaud* and *Packard* and citations to *Van Maren* and *Guice*.<sup>263</sup> After deciding the ownership question, the court stated:

The community property, as a rule, constitutes the earnings, gains, and savings of a man during his whole lifetime. If he can make presents to his friends, provide for indigent relatives, or make advancements to his children, it must be from this property. To

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259. 116 Cal. 339, 48 P. 228 (1897).

260. *Id.* at 340, 48 P. at 228.

261. *Id.* at 341, 48 P. at 229.

262. *Id.* at 342-44, 48 P. at 229. The discussion of the ownership interests of the spouses consumes 85 percent of the court's 10-page opinion in volume 116 of California Reports. The court in *Stewart v. Stewart*, 199 Cal. 318, 334, 249 P. 197, 204 (1926), made clear that this portion of *Spreckels* is not dictum, saying that *Spreckels* settled the ownership question once and for all.

263. 116 Cal. at 346, 48 P. at 230.



deprive him of this power is certainly to divest him of a property right.

This argument need not, however, be pursued further, because counsel admit that if the husband is the owner of the property, then a statute which makes the exercise of the right to dispose of it subject to the will of another is unconstitutional.<sup>264</sup>

The most important aspect of the *Spreckels* opinion is that it views the primary question to be whether *W* had any interest in the pre-1891 community property (corporate stock) that *H* gave away. This would not have been an issue and would not have been discussed by the court had the justices viewed the power to make a gift as itself an item of property. Suppose property had been granted by an owner "to *A* and *B* in fee as tenants in common with a special power of appointment in *A* to appoint by deed to any person other than *A*, *A*'s creditors, or *A*'s estate." Now suppose the state legislature subsequently enacted a statute purporting to abolish all such special powers of appointment and that after such enactment *A* attempted to appoint the full fee title to *C* and his heirs. The court would surely hold that *A*'s special power of appointment was itself property and that the legislature could not by statute divest him of it. The fact that *B* had an equal half ownership of the fee that was appointed to *C* by exercise of the power would be wholly irrelevant to the constitutional issue, because what *B* was granted was a defeasible interest, and *B* had no basis at all for complaint when defeasance occurred by exercise of the power of appointment. If, rather than abolishing the power of appointment in *A*, the statute purported to require the consent of all owners of the fee (*i.e.*, in the hypothetical case, the consent of *B*) before the power could be exercised, the court would still hold the statute unconstitutional because of its impairment of the pre-enactment property right granted to *A*.

Thus, in *Spreckels*, if the court had viewed *H*'s pre-1891 power to make a nonfraudulent gift of community property as itself a property interest (akin to a special power of appointment by deed), application of the 1891 statute would have been an unconstitutional taking of property whether or not *W* had any proprietary interest in the property *H* gave away. Indeed, the statute would have been unconstitutional if *W* had owned *every* interest in the property *H* gave away subject only to *H*'s special power of appointment over that property.

Since the issue of *W*'s ownership interest in the property would have been irrelevant if *H*'s power to make a gift was itself property,

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264. *Id.* at 348-49, 48 P. at 231.

either (1) the *Spreckels* court erred when it declared at the outset of the opinion that it was necessary to decide *W*'s ownership interest to resolve the retroactivity question and then foolishly devoted 85 percent of its opinion to analysis of an irrelevant issue, or (2) the power of *H* to make a gift was not itself property. I submit that a reading of the entire *Spreckels* opinion compels the conclusion that the second alternative is the correct explanation of *Spreckels*.

The reason that the court held application of the 1891 amendment unconstitutional in *Spreckels* was not the statute took a separate item of property from *H*. Rather, it impaired, slightly, *H*'s overall full ownership of the community property (in which *W* had no ownership interest) by limiting one of the numerous benefits, privileges, or rights—nonproprietary in themselves—that pre-enactment law had given to owners of property. That is, *H*'s pre-1891 power to give his "community" corporate stock to the defendant in *Spreckels* was no more "property" than his power to use his wealth to buy a slot machine, finance a trip to Mongolia, or give a mink coat to the mayor's wife.

Such nonproprietary powers to use property are generally freely impairable by the legislature. If it perceives that gambling is an evil, it can direct that *H* not purchase gambling equipment with his assets, even with wealth acquired before enactment of the antigambling statute. If the legislature perceives a danger of unequal law enforcement or corruption when citizens make lavish gifts to spouses of municipal officials, it can abolish the right to use property in that manner, and it can apply the law to items of property acquired by the citizen prior to enactment of the new law. The courts will usually uphold such "retroactive" application of the new law without any balancing or weighing of interests because no monetary loss is suffered by the property owner, no reliance interests are dashed, no expectations thwarted;<sup>265</sup> at the same time public morality will obviously be fostered by applying the law "retroactively" to pre-enactment acquisitions.

In *Spreckels*, limiting *H*'s power to make gifts of his property by requiring consent of a non-owner did not inflict any monetary loss upon *H*; nor is it at all likely that *H* acquired any property before 1891 in actual reliance on being able to make gifts thereof to his children or

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265. This might not be true in exceptional cases—as where a person had built a gambling casino and bought and installed all the equipment except slot machines when the statute was passed. But the fact that a court in such a case would have to balance the interests does not mean that as a general rule the "right" to buy a slot machine is not freely impairable.

anyone else.<sup>266</sup> Certainly, it is so unlikely that any person would quit his job, not make an investment, or in any other manner decrease his level of acquiring wealth, if he were advised he could not make gifts of his acquisitions without consent of another, that the court would not assume such a state of facts but would require proof of them. And, of course, the *Spreckels* court does not even suggest that *H* had done anything prior to 1891 he would not have done had he been forewarned that a "retroactive" law limiting his power to make gifts would be enacted.

Why then did counsel stipulate "that if the husband is the owner of the property, then a statute which makes the exercise of the right to dispose of it subject to the will of another is unconstitutional"? And why did the court accept this stipulation? The reason must be that the 1891 amendment was considered so arbitrary as to violate due process if *H* alone were the owner of the property but reasonable if *H* and *W* were co-owners. That giving *W* a veto power over all gifts was reasonable if she were an equal owner of community property perhaps cannot be quarreled with. The point conceded is debatable, however. The legislature could reasonably conclude that most surviving widows depended for their sustenance on the half of the community property they would receive as forced heirs of their husbands, and that empowering the potential widow to veto gifts of community property by *H* was a reasonable means to reduce the number of impoverished widows who had to rely on charity or public welfare to survive. On the other hand, in 1891 the case law gave *W* some protection from gifts made by *H* with intent to defraud her, and there was authority that she could obtain relief in the case of immoderate gifts.<sup>267</sup> A less drastic intrusion on *H*'s pre-1891 privilege as a property owner could have been fashioned to protect *W*.<sup>268</sup> Moreover, the 1891 statute was needlessly overbroad in failing to exempt small gifts to relatives, churches, charities, etc. It is somewhat startling for the law to tell *H* he cannot give a small part of his paycheck to his sick mother or to his church without *W*'s consent, especially when she has no present proprietary interest in those earn-

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266. It must be conceded, however, that Mr. Spreckels had a proclivity for making large gifts of community property. See *Spreckels v. Spreckels* (II), 172 Cal. 775, 778, 158 P. 537, 537-38 (1916).

267. See note 234 *supra*.

268. Chief Justice Beatty, concurring in *Spreckels*, suggested that in determining at *H*'s death what *W* had as heir a right to take half of, *H*'s community estate be valued by including the worth of the items he had given away. Thus, in fact, *W* would take more than half of what remained under Chief Justice Beatty's formulation. 116 Cal. at 350-51, 48 P. at 231-32.

ings.<sup>269</sup> In sum, it appears the stipulation in *Spreckels* was reasonable, and certainly it was reasonable for the court to accept it.<sup>270</sup>

It follows then that *Spreckels* holds two things and no more: (1) that *W* has no ownership in pre-1927 "community" property; and (2) that the California Supreme Court will accept as reasonable a stipulation that a law forbidding a person to make any gift from his own property without written consent of his forced heir presumptive is so arbitrary as to deny due process. *Spreckels* also very strongly implies, although it does not expressly hold, that *H*'s pre-1891 power to make a gift of community property was not itself a proprietary interest like a power of appointment but simply one of the numerous privileges stemming from ownership of the property given away.

The only support for a contrary reading of *Spreckels* is in the court's ultimate conclusion regarding *H*'s gift-giving power and its impact on the constitutional issue: "[t]o deprive him of this power is certainly to divest him of a property right."<sup>271</sup> This is certainly not technically correct. However, it must be remembered that in older retroactivity cases a statement that a statute impaired a vested right was simply a conclusion of law that the due process clause had been violated. That the *Spreckels* court meant by this language merely that *H*'s exclusive ownership of the underlying property was being impermissibly impaired seems clear from its statement of the issue in the case:

To determine whether the amendment, if applicable to community property acquired prior to its passage, would deprive the husband of a vested *right of property*, it is necessary to consider what were the rights of husband and wife in the *community property* at the date of its passage.<sup>272</sup>

Since ownership of the community property would be irrelevant if the gift-making power were itself property, it can hardly be said that the

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269. Without doubt, serious constitutional problems exist even today under CAL. CIV. CODE § 5125(b) (West Supp. 1975). It is often the case that a married couple's only wealth consists of community property. California requires a person, as a condition of marrying, to waive the right to use without the consent of another his or her earnings to participate in, by making gifts to, the church or political party of his choice. Political activity, religious participation, and marriage are all fundamental rights. How can the state constitutionally condition the third on waiver of the first two?

270. Stipulations of law are not binding on the court, and erroneous stipulations will not be accepted. *San Francisco Lumber Co. v. Bibb*, 139 Cal. 325, 73 P. 864 (1903).

271. 116 Cal. at 348-49, 48 P. at 231.

272. 116 Cal. at 341, 48 P. at 229 (emphasis added).

initial reference to a "vested right of property" meant that the gift power was itself property. As used in *Spreckels*, the terms "vested right of property" and "property right" mean simply that there is at issue such a benefit, right, or privilege conferred by pre-enactment law that to impair or limit it, under the facts and circumstances of the case, by applying the new statute to pre-enactment acquisitions would be unconstitutional. The "vested property" label would, of course, not necessarily apply if the facts and circumstances were different.

The next California decision dealing with retroactivity of statutes changing the law of management and control was *Duncan v. Duncan*.<sup>273</sup> In 1901, the legislature had enacted a provision<sup>274</sup> barring *H* from selling or encumbering community household furnishings without *W*'s written consent. In 1904, Mr. Duncan, without his wife's consent, sold such items of property acquired by him before the 1901 statute was enacted. The court, relying on *Spreckels* and without extended discussion, held the 1901 act could not apply to subsequent dispositions by *H* of pre-enactment community property. After *Spreckels*, *Duncan* was a simple case. In 1901, *W* still had only a forced heir's interest in community property, to which had been added a power to veto gifts of post-1891 acquisitions by the sole owner, *H*. *W*'s power to veto gifts was obviously irrelevant in determining whether it was arbitrary to allow a forced heir to veto a nonfraudulent sale of property for good consideration. Unless the forced-heir theory of community ownership were to be overruled, the decision in *Duncan* followed a fortiori from *Spreckels*.<sup>275</sup>

The third significant decision in California concerning the validity of retroactivity of statutes altering management and control law is *Roberts v. Wehmeyer*.<sup>276</sup> At issue was the constitutionality of applying to pre-enactment property a 1917 statute providing that *W* must join

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273. 6 Cal. App. 404, 92 P. 310 (1907).

274. Ch. 190, § 1, [1901] Cal. Stats. 598, amending § 172 of the Civil Code of 1872. In addition to household furnishings the 1901 amendment to § 172 of the Civil Code covered "the clothing or wearing apparel of the wife or minor children which is community property."

275. After all, the pre-enactment law did not leave *W* and the children with no right to furniture and clothing. *H* had a duty to support them. *H*-managed property could be reached by suppliers of such necessities if *H* neglected to supply them. Apparently, what the legislature feared was a real down-and-out *H*, with no funds, selling the furniture and clothes for a final bourbon binge before deserting *W*. In such a situation no merchant would sell replacement clothes and furniture to *W* on credit even if *H*'s property was theoretically liable.

276. 191 Cal. 601, 218 P. 22 (1923).

in all conveyances or encumbrances by *H* of community real property, except for leases of 1 year or less.<sup>277</sup> In most instances, *W* had 1 year to bring suit to set aside *H*'s transfer without her joinder.

In *Roberts*, *H* had conveyed without *W*'s joinder community realty purchased by him with money obtained before 1917. *W* brought a timely suit to set aside the conveyance. The court held that to give retroactive application to the new management provision—making it applicable to pre-enactment acquisitions<sup>278</sup>—would be unconstitutional. Once again, the court viewed the sole determinative factor in the case to be whether *W* was a co-owner of the pre-1917 community cash. The court made an exhaustive review of the authorities concerning *W*'s interest in community property, from *Febrero* to *Guice* to *Spreckels*.<sup>279</sup> Its conclusion was that *H* was the sole owner of the community cash and *W*'s interest was but a mere expectancy. "Under these circumstances," (*i.e.*, no ownership interest in *W*), said the court, applying the 1917 act to pre-enactment property acquired by *H* "would deprive him of a vested right."<sup>280</sup> *Holyoke v. Jackson*,<sup>281</sup> a Washington case, reaching a result precisely opposite to *Roberts*, on a similar retroactivity issue, was distinguished on the ground that Washington law viewed *H*

277. Ch. 583, § 2, [1917] Cal. Stats. 829.

278. The fact that at the time of the 1917 statute the property *H* had acquired was in the form of cash rather than realty was irrelevant to the court. *H*'s right to invest his pre-1917 community cash in realty could not be conditioned on his giving up his exclusive power to sell the item invested in. 191 Cal. at 605, 218 P. at 23.

279. The court also cited post-*Spreckels* cases such as *In re Estate of Moffitt*, 153 Cal. 359, 95 P. 653 (1908), holding that when *H* died, survived by *W*, one half of the "community" property did not escape the inheritance tax on the ground that it did not pass to *W*; rather she acquired her half interest from *H* at his death as an heir.

280. 191 Cal. at 612, 218 P. at 26, *followed*, with respect to the retroactivity holding, in *Capp v. Rives*, 62 Cal. App. 776, 217 P. 813 (1923). The *Roberts* court was certainly in error in stating that *W* had only a "mere expectancy" in the community property in 1917 when the new section was enacted. As to all post-1901 acquisitions she had in addition to the expectancy of a forced heir two powers—to veto gifts and to veto sales and encumbrances of household furniture and her clothes and those of the children. It is obvious, however, that the court considered the powers to be nonproprietary. *See* 191 Cal. at 611-12, 218 P. at 26. This had been clearly established in *Spreckels v. Spreckels* (II), 172 Cal. 775, 158 P. 537 (1916), with respect to the 1891 act giving *W* a veto power over gifts by *H* of community property. The question of the nature of the powers given *W* in 1891, 1901, and 1917 (the veto over realty transfers at issue in *Roberts*) is exhaustively analyzed in *Stewart v. Stewart*, 199 Cal. 318, 331-38, 249 P. 197, 204-06 (1926). *See also* *Trimble v. Trimble*, 219 Cal. 340, 26 P.2d 477 (1933); Comment, *The Interest of a Wife in California Community Property*, 22 CALIF. L. REV. 404, 412-16 (1934) [hereinafter cited as *Wife's Interest*].

281. 3 Wash. Terr. 235, 3 P. 841 (1882). *See* text accompanying notes 412-13 *infra*.

and *W* as having "equivalent rights of property."<sup>282</sup> A case involving New Mexico's community property system, *Arnett v. Reade*,<sup>283</sup> in which the United States Supreme Court reached exactly the opposite result on the identical issue posed in *Roberts*, was also distinguished on the ground that under New Mexico's community property system "the wife had a greater interest than a mere possibility," while in California the "husband is held to have absolute ownership of the community."<sup>284</sup>

It is thus even clearer in *Roberts* than it was in *Spreckels* that the sole reason for holding retroactive application of the change in management and control law unconstitutional was the fact that *W* had no ownership interest, merely a forced heir's expectancy (with a couple of irrelevant powers). The court expressed no disapproval of *Holyoke v. Jackson* and *Arnett v. Reade*, and there is every reason to believe that it would have followed these cases had it been dealing with community property in which *W* had an ownership interest. Actually, given the conclusion that *W* is merely a forced heir, the *Roberts* decision is unavoidable because it is indeed arbitrary to forbid the owner of property to sell it for good consideration if he wishes to do so, since this does not reduce the value of the forced heir's expectancy.<sup>285</sup>

Just as in *Spreckels*, a reading of the entire *Roberts* opinion does not support the contention that the pre-1917 privilege or right to sell certain lands owned by *H* was itself viewed as property by the court. That theory would render the lengthy discussion of the interest of the spouses in community property senseless, for the power to sell would be no less vested in *H* if *W* had an ownership interest in the property subject to that power. The court's conclusion that to apply the 1917 act to realty traceable to pre-1917 community property "would deprive him [*H*] of a vested property right" means only that so applying the

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282. 191 Cal. at 611, 218 P. at 25.

283. 220 U.S. 311 (1911). See text accompanying notes 327-29 *infra*.

284. 191 Cal. at 614, 218 P. at 27.

285. It must be conceded that such a limitation on the sole owner is less unreasonable when the forced heir is his wife, especially if the source of the funds to purchase the realty was *W*'s own earnings. In none of the retroactivity cases, however, was that latter fact (property traceable to *W*'s earnings) established. The social policy of California's forced-heir community property system was to make sure *W* was well provided for when *H* died. If *H* wanted to sell real property investments and reinvest the proceeds in stocks and bonds, for example, *W* would presumably be just as well provided for at *H*'s death. If she as a widow wanted real property holdings she could use her "inheritance" of community personalty from *H* to buy her own realty. The 1917 statute would have been far more reasonable and the *Roberts* decision might have gone the other way had the statute applied only to the family home.

statute would be unconstitutional. That the reference to vested right is merely a conclusory label signifying a finding of unconstitutionality through retroactive impairment of one aspect of *H*'s privileges or rights as the sole owner of the property is even clearer in *Roberts* than in *Spreckels*, for the conclusory words are used in a sentence beginning "[u]nder these circumstances . . . ." <sup>286</sup> Obviously the court was indicating that under other circumstances—*e.g.*, where *H* was not the sole owner of the property—the conclusory label might not be applied.

It is useful to speculate how *Roberts* would have been decided if the community property invested in California realty had been acquired while *H* and *W* were domiciled in Washington, where *W* held an ownership interest. *Arnett v. Reade* would have been in point and probably would have been followed with a holding that applying the 1917 statute to pre-1917 acquisitions was constitutional. The best argument *H* could make against such a holding would be as follows: when I, several years ago on moving to California, decided to go into the business of buying, selling, and leasing real property, I relied on the rule of exclusive male management; I did not incorporate my business but simply operated it and bought the real property in my own name; to have to get *W*'s signature on every lease and deed I make is a tremendous burden, and if we are having a quarrel when an important deal jells she can simply ruin my business by withholding consent.

This is at first blush an appealing argument and merits more attention than the United States Supreme Court gave to the issue in *Arnett*. *H*'s position can be rejected on the ground that his reliance on pre-1917 law was unreasonable per se. Where the law declares two persons equal co-owners of property, a further rule purporting to give one of them exclusive management for no reason other than the nature of that co-owner's genitalia is harsh, unfair, and manifestly a rule likely to be changed. It would have been all the more harsh were *W*'s own earnings used to buy the realty. Insofar as *Arnett* holds that no person can have a vested right (*i.e.*, protected interest due to reasonable reliance) in an unfair and arbitrary rule of law, it is sound. In any event, *Arnett* was not followed in *Roberts* because the community property at issue there was subject to California's forced-heir system.

In *Trimble v. Trimble*,<sup>287</sup> the surviving *W* sued to set aside in toto donative deathbed conveyances *H* had made in 1929 of community

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286. *Roberts v. Wehmeyer*, 191 Cal. 601, 612, 218 P. 22, 26 (1923).

287. 219 Cal, 340, 26 P.2d 477 (1933).



realty acquired in 1915, 1920, and 1925. It had been established prior to *Trimble* that, when *W* sought relief after *H*'s death from a violation of the 1891 statute giving *W* a veto power over gifts by *H* of community property, she could recover only half the property he had given away.<sup>288</sup> The *Trimble* court assumed that the same rule applied when a gift of real property was made, notwithstanding the 1917 statute requiring *W*'s joinder in conveyances of community realty. However, *W* had another theory. *H* had died intestate, and *W* contended that to let his gifts stand even as to one half would defeat the purpose of the 1923 statute,<sup>289</sup> which made *W* the sole intestate heir of *H*'s community property.

Rejecting *W*'s argument, the court held that the 1923 descent statute did not confer any rights on *W* until *H* died,<sup>290</sup> by which time, of course, the gifts had been made. In dictum, the court said that, in any event, with respect to the 1915 and 1920 acquisitions, the 1923 statute could be of no help to *W*, because "[t]he respective rights of husband and wife in community property are determined by the law in force at the date of its acquisition."<sup>291</sup> The dictum assumed that the 1923 statute was a change in the law of management and control, making *H*'s unilateral gifts void in toto rather than voidable as to one half, as they were under the 1891 statute. Although *Spreckels* might have been distinguished on the ground that merely broadening *W*'s remedy under the 1891 statute was not as arbitrary as initially conferring management participation on a forced heir, the constitutionality of applying the presumed interpretation of the 1923 statute to pre-enactment acquisitions was deemed to be controlled by *Spreckels*.<sup>292</sup>

The *Trimble* holding that the 1923 descent statute had no bearing on *H*'s management powers inter vivos (*i.e.*, to make his gifts voidable in toto rather than as to one half) is sound. The dictum is erroneous. If in fact the 1923 legislation had declared that no inter vivos gift would be valid as a will substitute, such a statute would have concerned succession and wills and therefore could apply to all such will substitutes made after its enactment.<sup>293</sup>

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288. *E.g.*, *Dargie v. Patterson*, 176 Cal. 714, 169 P. 360 (1917).

289. Ch. 18, § 1, [1923] Cal. Stats. 29.

290. 219 Cal. at 345, 26 P.2d at 479.

291. 219 Cal. at 343, 26 P.2d at 479.

292. 219 Cal. at 346, 26 P.2d at 480.

293. In *Britton v. Hammell*, 4 Cal. 2d 690, 52 P.2d 221 (1935), it was held that during marriage *W* could set aside *H*'s unilateral gift of community property in toto. *Trimble* was explained in *Britton* as validating half of *H*'s gift because it was testamen-

In any event, since post-1927 community property owned equally by *H* and *W* was not involved in *Trimble*, what was said by the court there is pertinent only to community property held under the forced-heir system of ownership.

What the *Spreckels-Duncan-Roberts-Trimble* line of cases does establish is that the legislature cannot confer on a forced heir, even though she be the owner's wife, any participation in management of pre-enactment acquisitions. The crux of each of the decisions was that with respect to community property *W* had no ownership interest, merely the expectancy of an heir. The arbitrariness of inserting a presumptive heir into management was the basis of these decisions. However, if at the time a person initially acquired property by his labor or talent the law provided that the forced heir would have certain powers over it, the acquiring owner was on notice and acceded to such a rule; thus the 1891, 1901, and 1917 statutes could constitutionally apply to post-enactment community acquisitions.

However, it seemed apparent in *Spreckels* and quite clear in *Roberts* that these decisions would have been different—retroactive application of the statutes would have been upheld—had the property been acquired under a system whereby *W* was an equal owner along with *H*.

### 3. *Constitutionality of Retroactive Statutes Shifting Ownership in Community and Separate Property*

The line of California community property retroactivity cases involving statutes that shift not management powers but actual ownership of property is not directly pertinent to the question whether Civil Code sections 5125 and 5127 can validly apply to pre-1975 acquisitions. These are property-taking retroactivity cases in which an interest owned by one person is declared by statute to belong to another. The reliance interest of the original owner that would be impaired by retroactive application of the property-taking statute is often substantial. Several of the cases in this line involved unimpairedly vested rights where not even a strong social policy to correct a perceived injustice in the prior law could uphold a taking of property without compensation under the balancing test.

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tary in nature—a will substitute. (“[T]he husband had the right, at his death, to give away one-half [of that property] by will . . . .” 4 Cal. 2d at 692, 52 P.2d at 222.) Since the issue involved devolution at death and not inter vivos management, the law in effect when *H* died (or when he made the will substitute) would govern. See *In re Estate of Phillips*, 203 Cal. 106, 263 P. 1017 (1928); note 347 *infra*.

The first case in this line, *In re Estate of Frees*,<sup>294</sup> involved 1917 legislation<sup>295</sup> that the court viewed as converting English common law "separate" property to community property upon a couple's taking up a California domicile whenever the common law separate property would have been community if acquired under California law. After abolition of coverture<sup>296</sup> American common law of marital property made a spouse's acquisitions his or her own "separate" property, the other spouse having only an expectant interest such as dower or a non-barrable share as heir. Since the 1917 California legislation was enacted before California had a true community property system, to convert any of *W*'s common law separate property to California community property would have constituted a taking; it would have replaced her ownership interest under common law with the forced heir's share given *W* in all California community property and upgraded *H*'s interest from an expectancy to absolute ownership. On the other hand, in the case of *H*'s property acquired in a common law state, the legislation would often have increased *W*'s expectancy from the typical common law one-third to California's forced heirship in one-half, and it would have given *W* powers to veto gifts, sales of household furnishings, and transfers of realty purchased with funds brought from the common law state. By interpreting the statute to be prospective only, the court in *Frees* avoided the constitutional issues arising from applying this legislation to pre-1917 acquisitions in general and to property already brought to California before the effective date of the new law in particular.

Although the next case did not concern retroactive application of a statute, it is significant in this line of cases because the parties asked the California Supreme Court, rather than the legislature, to abandon the forced heir theory of community property. *Stewart v. Stewart*,<sup>297</sup> decided in 1926, was a declaratory judgment action designed as a test case for purposes of the federal tax law.<sup>298</sup> Hoping to obtain the bene-

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294. 187 Cal. 150, 201 P. 112 (1921). See also *In re Estate of Drishaus*, 199 Cal. 369, 249 P. 515 (1926).

295. Ch. 581, § 1, [1917] Cal. Stats. 827.

296. By early in the 20th century most of the states adhering to the English common law system of marital property rights had, by a series of statutes generally called "married women's property rights acts," abolished coverture and recognized ownership in *W* of property that would have been hers if single. See R. POWELL, *REAL PROPERTY* § 117 (1973); Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 *TUL. L. REV.* 21, 31-32 (1974).

297. 199 Cal. 318, 249 P. 197 (1926).

298. See notes 357-60 and accompanying text *infra* with respect to income-splitting benefits that California taxpayers hoped to achieve.

fits of income splitting for income tax returns, the parties argued that the line of cases establishing the forced-heir theory of community property ownership was erroneous. The court rejected this contention. Once again, the court made an exhaustive historical review from *Feb-bero* to *Spreckels* and beyond. In explaining *Spreckels*, the *Stewart* court stressed that portion of the *Spreckels* opinion that distinguished retroactivity decisions in other states, such as Washington, on the basis of "divergent views as to the nature of the wife's interest."<sup>299</sup> *Spreckels* was also said to stand for the proposition that parties' rights in community property must be determined by the state of the law at the date of acquisition.<sup>300</sup> This was, for the most part, an accurate summary of the *Spreckels* rule; so long as *W* was a mere presumptive heir of community property and not an owner, any statute giving her rights, such as management power, associated with ownership rather than the expectancy of an heir would have to be prospective only in the form of upgrading *W*'s interest in order to avoid arbitrary legislation dealing with property owned solely by *H*. By this analysis of *Spreckels* the court seems to have been warning the parties in *Stewart*: even if we agreed with you, which we don't, we could not abolish the forced-heir theory of community property retroactively with respect to acquisitions made prior to our decision.

The trial court judgment in *Stewart* declaring *W* an equal owner of community property was reversed. While further proceedings took place in the trial court on remand, former Civil Code section 161a was enacted in 1927, declaring the spouses' interests in community property to be present, existing, and equal. The trial court once again held *W* an equal owner, and on a second appeal to the California Supreme Court<sup>301</sup> in 1927 that judgment was again reversed. Following the implications of its first *Stewart* opinion, the court held that the new statute "cannot in any manner relate to or govern the ownership of property acquired prior thereto."<sup>302</sup> No further elaboration was needed, since, in view of the forced-heir theory of community property ownership applicable to pre-1927 acquisitions, applying section 161a retroactively would have taken half of *H*'s property and given it to *W* without compensating *H* (since *W* owned no community property that section 161a could operate on).

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299. 199 Cal. at 333, 249 P. at 203.

300. *Id.* at 341, 249 P. at 207.

301. 204 Cal. 546, 269 P. 439 (1928).

302. *Id.* at 555, 269 P. at 442.

A companion case to *Stewart (II)*, *McKay v. Laursiton*,<sup>303</sup> dealt more extensively with property-taking retroactivity. *H* had acquired community real property in 1918. At that time, of course, he was the sole owner and *W* was an expectant heir holding in addition certain veto powers. By legislation in 1923<sup>304</sup> *W* was given the power to bequeath and devise half of the community property if she predeceased *H*. *W* in *McKay* died testate in 1926, survived by *H*. The court, as one would expect, held that the 1923 legislation—viewed as giving *W* another power over community property, this time a testamentary power of appointment over an undivided half interest—could not be applied to *H*'s pre-enactment acquisitions. This was so because *H* had "absolute title,"<sup>305</sup> and no stranger to that title could divest him of it by purporting to exercise such a power. The court also said:

It has been consistently and repeatedly held by this court, beginning with the case of *Spreckels v. Spreckels* . . . down to cases of recent determination that amendments whereby it was sought to lessen, enlarge, or change in any manner the rights of the respective spouses in community property will not be given retroactive effect so as to affect the respective rights of the parties in community property acquired prior to the enactment of such amendments.<sup>306</sup>

*Roberts* and *Stewart* were also cited.

It will be on this broad language, repeated in subsequent decisions, that the case for asserting the unconstitutionality of retroactive application of amended Civil Code sections 5125 and 5127 will be based. Three points must be noted about this passage from *McKay*. First, although *McKay* was decided in 1928, it dealt with pre-1927 "community" property—property owned entirely by *H* in which *W* had but an heir's expectancy and a few assorted powers. There is nothing in the *McKay* opinion indicating that the court, after stressing that *H* was the "absolute owner" of community property, intended the quoted passage to apply not only to such property under the forced-heir system but also to post-1927 acquisitions under the dual ownership system of a true community of property.

Second, the purported rule drawn from *Spreckels* is so broad that it is even erroneous under the forced-heir system when applied to pre-1927 "community" property. The crux of all the retroactivity decisions

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303. 204 Cal. 557, 269 P. 519 (1928).

304. Ch. 18, § 1, [1923] Cal. Stats. 29, amending former § 1401 of the Civil Code.

305. 204 Cal. at 566, 269 P. at 523.

306. *Id.*

prior to *McKay*, and of *McKay* itself, was that *W*'s interest in community property was not proprietary, not vested, and not subject to post-acquisition statutes attempting to protect it from gifts and conveyances by *H*. It seems obvious that the same court that decided *McKay* would have had to uphold an act of the legislature eliminating *W*'s expectancy or reducing it, as from one-half to one-third.<sup>307</sup> Yet, the quoted passage from *McKay* states that the legislature "cannot change in any manner the rights of the respective spouses in community property" by a retroactive statute, and if literally construed this includes *W*'s expectancy. Reading the entire *McKay* opinion, it seems apparent that by the quoted passage the court meant that because of the nature of the spouse's interest in "community" property prior to 1927, any change in the law affecting benefits that stem from proprietary rights cannot apply to pre-enactment acquisitions; such retroactive shifting of rights associated with proprietary interests would be arbitrary.

Third, *McKay* was a property-taking retroactivity case. Since *W* died before *H*, her expectancy as an heir never vested in her. But the 1923 statute sought to give her a power, exercisable by her will, to strip away half of *H*'s ownership rights in "community" property and to vest them in *W*'s legatees. And *W*'s will purported to act on property acquired by *H* before enactment of the 1923 statute, which gave her such a testamentary power of appointment. *McKay* was thus a case where the legislature made *W* its agent to take half of *H*'s property from him at her death. The rules stated in the opinion in such a property-taking case should have no application to a case where nonproprietary rights of management and control are changed by the legislature. The reasonableness of shifting management powers between co-owners of property is a very different inquiry than the validity of taking half a man's own property when his wife dies.

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307. See notes 279, 293 *supra*. See also ARMSTRONG, *supra* note 231, at 596-97. With respect to the legislature's freedom to alter rules of heirship, see *In re Estate of Phillips*, 203 Cal. 106, 263 P. 1017 (1928), decided just a few months before *McKay*. See also ARMSTRONG, *supra* note 231, at 597.

A similar erroneous statement appears in the first *Stewart* opinion, where the court said the legislature could not alter rights in community property under the law at the time of acquisition, even if they "do not amount to vested interests" in the property. Of course, the very crux of a nonvested right is that the legislature *can* eliminate it. Thus, if *H* moved his domicile to California from a common law state, *W* lost her expectancy as heir in *H*'s separate property because her interest was not vested. *In re Estate of O'Connor*, 218 Cal. 518, 23 P.2d 1031 (1933). Likewise, since the *Stewart* court itself held that the powers conferred on *W* in community property by the legislation of 1891, 1901, and 1917 gave her no vested interest in the property, the legislature certainly could have eliminated them retroactively under the reasoning in the *Stewart* opinion.

Depending on one's interpretation of the opinion, *In re Estate of Thornton*<sup>308</sup> may or may not be a case where retroactive application of a statute was held unconstitutional because the statute authorized a taking of one spouse's ownership interest in property and giving it to the other spouse, rather than a shifting of mere management powers. *Thornton* presented facts that forced the court to face the constitutional issues it had ducked in *In re Estate of Frees*.<sup>309</sup>

Mr. Thornton in 1885-99 and 1906-19, while married to *W* and domiciled in Montana, acquired property that was his own under Montana law, *W* having "dower"<sup>310</sup> rights (apparently meaning a nonbarable share of an heir in personalty). In 1919 *H* established a California domicile (which also became *W*'s) and brought his Montana-acquired property with him. Thereafter *H* died while a California domiciliary, and *W* claimed half of the property under former Civil Code section 164.<sup>311</sup> As noted above,<sup>312</sup> a 1917 amendment to section 164 was viewed as converting common law separate property of the type *H* had brought from Montana into community property as soon as the marital domicile was changed to California.<sup>313</sup>

The trial court held the statute unconstitutional, and the district court of appeal affirmed.<sup>314</sup> In its initial opinion the California Supreme Court upheld the statute, describing the effect section 164 would have on Mr. Thornton's property:

If the property was converted into community property in 1919, Mr. Thornton's power of disposition was considerably limited. Under section 172 of the Civil Code he could no longer give the property away without his wife's written consent. If he invested the personal property brought from Montana in real property here, he could no longer convey or encumber it without his wife's consent.

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308. 1 Cal. 2d 1, 33 P.2d 1 (1934).

309. See text accompanying notes 294-96 *supra*.

310. 1 Cal. 2d at 3, 33 P.2d at 2.

311. Ch. 581, § 1, [1917] Cal. Stats. 827.

312. See notes 294-96 and accompanying text *supra*. In response to *In re Estate of Frees*, 187 Cal. 150, 201 P. 1017 (1928) the legislature had, in ch. 360, § 1, [1923] Cal. Stats. 746, stated its intent that the 1917 legislation apply to common law separate property acquired at any time ("heretofore or hereafter").

313. Langdon, J., in an eminently reasonable dissent in *Thornton*, 1 Cal. 2d at 5-7, 33 P.2d at 3-4, would have avoided all constitutional doubts about the legislation by applying it to the facts of *Thornton* simply as a succession statute, allowing *W* to assert rights at *H*'s death, not at the time of change of domicile from Montana to California.

314. 12 P.2d 674 (Cal. 1932) (no official report), stating, *inter alia*, that the case had been tried on the theory that all of *H*'s Montana property was acquired before the enactment of 1917.

Sec. 172a, Civ. Code. These two limitations on the husband's power of disposal clearly constitute the deprivation of a property right which had "vested" under the law of Montana. *Spreckels v. Spreckels* . . . .<sup>315</sup>

Thus, the court correctly observed that where section 164 operated on *H*'s Montana separate property, rather than *W*'s, the effect was to decrease his management powers. *Spreckels* was directly applicable. However, the court went on to hold in effect that, when *H* changed his domicile to California, he waived his right to rely on the Montana law that gave him exclusive control over the property and consented to the application of section 164 to his property.<sup>316</sup> Alternatively, the court in effect overruled the *Spreckels* stipulation that legislation conferring rights with respect to property on one having no ownership interest was per se unconstitutional. The court stated that, even if the 1917 amendment constituted a deprivation of a property right in the constitutional sense, such legislation was permissible under the power of the legislature to control and regulate the marriage relation and its incidental property rights.<sup>317</sup>

On rehearing in *Thornton*, the court changed its mind with regard to both alternative holdings of the initial opinion and held that the 1917 statute was unconstitutional. Citing *Spreckels* and echoing the language of *McKay*, the court said that "any interference with right of ownership or dominion over the common property is a disturbance of a vested right of the husband."<sup>318</sup> The court felt it was "bound by the holding that to limit the right of one spouse by increasing the right of the other in property acquired by their united labors, is the disturbance of a vested right."<sup>319</sup> The court also ruled that *H* could not waive his rights under Montana law by operation of the statute. "Again, to take the property of A and transfer it to B because of his citizenship and domicile, is also to take his property without due process of law."<sup>320</sup>

The previous analysis of *Spreckels* shows that *H*'s power to make

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315. 19 P.2d 778, 781 (Cal. 1933) (no official report). The court went on to note that converting the property from *H*'s separate property under Montana law to community property would reduce *H*'s testamentary power from two-thirds to one-half but that this would not deprive him of a vested right. It seems clear that although the court was writing in the 1930's it was well aware that the type of community property it was dealing with was pre-1927, forced-heir community property.

316. 19 P.2d at 782 (no official report).

317. *Id.* at 784 (no official report).

318. 1 Cal. 2d at 3, 33 P.2d at 2.

319. *Id.* at 5, 33 P.2d at 3.

320. *Id.*



a gift without *W*'s consent was not itself property, for if it were, the constitutional question involving retroactivity would be decided without reference to whether *W* had some other proprietary interest in the property. Thus, the quotation from *Thornton* about taking property from *A* and giving it to *B* makes sense only if the court is deemed to be addressing the language of section 164 on its face rather than as applied to Mr. Thornton. It is clear that applying section 164 to property that *W* may have acquired in Montana thus giving it to *H* upon change of domicile would constitute a taking of her property. Since section 164 did not seem severable—at least there was no reason to believe the legislature would want section 164 to apply to *H*'s property when it was unconstitutional with respect to *W*'s—it was reasonable to declare the statute unconstitutional on property-taking grounds. It is on the assumption that this explanation of *Thornton* is correct that it is treated herein as a property-taking case. Otherwise, it is no different than *Spreckels*, *Duncan*, and *Roberts* as a decision involving retroactive changes in the law of management and control.

In any event, *Thornton* is addressed entirely to California's pre-1927 forced-heir system of community property and has no direct bearing on cases involving property subject to a true community of property regime.

*Boyd v. Oser*,<sup>321</sup> involved an attempt by *W*, on predeceasing *H*, to bequeath half of community rents and profits received after the 1923 enactment giving *W* testamentary power over half the community property. The primary issue in the case was whether the post-1923 profits would relate back to their pre-1923 source, thereby excluding them from the provisions of the 1923 act under *McKay*. The majority held that the 1923 act did not apply, reasoning that *H* must have the same rights in the fruits as he has in the tree. The majority noted that *H* had "absolute title" to the pre-1923 community property and reiterated what *McKay* had said about retroactive laws affecting community property.<sup>322</sup> Since the majority opinion is addressed solely to pre-1923 acquisitions, it is pertinent only to retroactivity under the forced-heir system of community property.

A concurring opinion by Justice Traynor in *Boyd* indicates a willingness to re-examine in future cases the validity of language like that in *McKay* to the effect that legislation altering rules of the community

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321. 23 Cal. 2d 613, 145 P.2d 312 (1944).

322. *Id.* at 619-20, 145 P.2d at 316. For a much sounder approach to the fruit-of-the-tree problem, see *Bulgo v. Bulgo*, 41 Hawaii 578 (1957).

property system can never apply to pre-enactment acquisitions. His opinion in its entirety is:

I concur in the judgment. The decisions that existing statutes changing the rights of husbands and wives in community property can have no retroactive application have become a rule of property in this state and should not now be overruled. It is my opinion, however, that the constitutional theory on which they are based is unsound. (*Warburton v. White*, 176 U.S. 484 [20 S. Ct. 404, 44 L.Ed. 555]; *Arnett v. Reade*, 220 U.S. 311 [31 S. Ct. 425, 55 L.Ed. 477].) That theory has not become a rule of property and should not invalidate future legislation in this field intended by the Legislature to operate retroactively. (See Johnston, *Community and Separate Property: Constitutionality of Legislation Decreasing Husband's Power of Control Over Property Already Acquired*, 27 Cal.L.Rev. 49.)<sup>323</sup>

Thus Traynor would refuse to overrule certain cases because they had become a "rule of property"—persons had acquired property in reliance on them and changed position on the basis of that reliance so that a retroactive overruling would be unreasonable.<sup>324</sup> It seems clear from prior discussion that such decisions would include *Spreckels*, assuring *H* and his donee that unilateral gifts of pre-1891 community property are valid; *Duncan* assuring that sales by *H* of pre-1901 household furnishings are lawful, even without *W*'s consent; and *Roberts*, inviting reliance on the validity of sales of pre-1917 community realty without *W*'s joinder.<sup>325</sup> In addition, persons could rely on *McKay* as voiding all attempts by *W* to bequeath or devise pre-1923 community property.

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323. *Id.* at 623-24, 145 P.2d at 318, quoted with approval in *Addison v. Addison*, 62 Cal. 2d 558, 565, 399 P.2d 897, 901, 43 Cal. Rptr. 97, 101 (1965).

324. The leading California case discussing what "rule of property" means is *Abbott v. City of Los Angeles*, 50 Cal. 2d 438, 326 P.2d 484 (1958). It is a "principle . . . applied in California to avoid injustice which would result from the overruling of a judicial decision upon which parties have relied in investing money or acquiring property interests." *Id.* at 457, 326 P.2d at 495. See also *Cummings v. Morez*, 42 Cal. App. 3d 66, 73, 116 Cal. Rptr. 586, 590 (1974), quoting from *County of Los Angeles v. Faus*, 48 Cal. 2d 672, 312 P.2d 680 (1957).

325. See *Scott v. Austin*, 58 Cal. App. 643, 209 P. 251 (1922) (*Spreckels* is a rule of property); "Prospective" Application, *supra* note 215, at 495-96. (*Spreckels* and progeny should be overruled prospectively only because these decisions are rules of property). Although *Boyd* was itself a property-taking case like *McKay*, the majority did rely on such management-and-control cases as *Spreckels* and *Trimble* as well as on *McKay*. It thus seems reasonable to construe Justice Traynor's opinion as addressed to all the retroactivity situations referred to in the majority opinion, not just property-taking cases.

The opinion at first becomes somewhat puzzling when Traynor states that he considers "unsound" the constitutional theory on which these decisions are based. One would assume that the constitutional theory he refers to is that stemming from the stipulation in *Spreckels* that it would deny due process to give *W* some powers over *H*-owned property in which her interest was merely that of a forced heir. Traynor evidently felt, as did the full court subsequently in *Addison*,<sup>326</sup> that the state's police power and its concern in regulating the marriage relationship will authorize some impairments of benefits enjoyed by *H* as absolute owner of property.

But then it is difficult to explain his citation of *Warburton v. White and Arnett v. Reade*.<sup>327</sup> They have nothing at all to do with the unsoundness of the constitutional theory of *Spreckels*, dealing rather with the unsoundness of the community property theory of forced heirship.<sup>328</sup> It is clear, particularly in *Arnett*, that the reason the United States Supreme Court reached a conclusion under New Mexico law exactly the opposite of that in *Roberts v. Wehmeyer*<sup>329</sup> was not that it saw no constitutional problems in giving a forced heir some management participation over property; rather, it recognized that the New Mexico statute requiring *W*'s joinder in transfers of community realty was eminently reasonable because in New Mexico *W* had a greater interest in the community than the expectancy of a forced heir. A New Mexico *W* held an ownership interest she could convey, whereas a California *W*'s expectancy only had legal significance upon *H*'s death.

It is therefore a reasonable inference that Traynor's citation of *Warburton* and *Arnett* indicates that not only did he consider the constitutional theory of *Spreckels* unsound but that he also questioned its forced-heir theory of community property. Apparently, however, he would not overrule the forced-heir theory of pre-1927 community property;<sup>330</sup> rather, he would permit the legislature to make subsequent statu-

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326. 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

327. 23 Cal. 2d 613, 623-24, 145 P.2d 312, 318 (1944). The issue in *Warburton* was the validity of a Washington statute making *W*'s children, rather than *H*, her heirs, who would receive half the community on her death, if *H* survived her. The court held that since under Washington law *W* owned half the community property during marriage, the statute merely altered the law of descent, which a legislature is free to do. The importance of *Warburton* is its approval of *Holyoke v. Jackson*, discussed in text accompanying notes 412-13 *infra*.

328. Unlike dower, the expectancy of a forced heir did not survive *H*'s sale of land even if *W* did not join in the sale. See notes 283-86 and accompanying text *supra*; text accompanying note 338 *infra*.

329. See text accompanying notes 276-86 *supra*.

330. The forced-heirship theory was declared a "rule of property" itself in *Spreckels*

tory changes restricting the owner's management of such property by holding that the police power does permit legislation protecting a forced heir's share.

The most important aspect of Traynor's opinion is that he obviously agreed with the United States Supreme Court's decision in *Arnett* and would not impose, as a matter of California law, the strict *Spreckels* rule against retroactivity on statutes that retroactively adjust management powers over true community property of which the spouses are equal owners.

All of the post-*Boyd* retroactivity cases deal with property-taking statutes rather than changes in management and control, and all of them apparently involve post-1927 community property owned equally by the spouses.

In *Jacquemart v. Jacquemart*,<sup>331</sup> the question was whether former Civil Code section 169.1,<sup>332</sup> enacted in 1951, could be applied to pre-enactment acquisitions. It provided that *H*'s earnings acquired after a decree of separation were separate property, rather than community property as they had been under prior law. The court held that the statute would not apply retroactively. To have applied the statute retroactively to such earnings acquired before 1951 but after 1927 would have been to rip away *W*'s ownership of half the property and hand it over to *H* without paying *W* compensation, a clear taking of property. A similar problem arose in *Ottinger v. Ottinger*.<sup>333</sup> A 1955 statute<sup>334</sup> reclassified *H*'s earnings from community property to separate property whenever *H* was abandoned unjustifiably by *W*. The court said, "obviously, that section is not retroactive."<sup>335</sup>

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v. *Spreckels* (II), 172 Cal. 775, 158 P. 537 (1916), and *Stewart v. Stewart*, 199 Cal. 366, 249 P. 197 (1926).

331. 125 Cal. App. 2d 122, 269 P.2d 951 (1954).

332. Ch. 1700, § 12, [1951] Cal. Stats. 3913.

333. 141 Cal. App. 2d 220, 296 P.2d 347 (1956).

334. Ch. 525, § 1, [1955] Cal. Stats. 999, enacting former § 175 of the Civil Code.

335. 141 Cal. App. 2d at 225, 296 P.2d at 351. By ch. 1469, § 1, [1959] Cal. Stats. 3767, former § 169.2 of the Civil Code was enacted, providing that the earnings of *H* while living separate and apart from *W* after an interlocutory divorce judgment were his separate property. Previously they had been community property. In *Mears v. Mears*, 201 Cal. App. 2d 408, 412-13, 20 Cal. Rptr. 214, 217 (1962), the statute was applied prospectively without discussion of the constitutional problems of retroactivity.

In *re* *Marriage of Bouquet*, 44 Cal. App. 3d 679, 119 Cal. Rptr. 67 (1975), held that CAL. CIV. CODE § 5118, enacted in 1971, making *H*'s (as well as *W*'s) earnings separate property following a separation not formalized by any judicial decree, was not intended to be and could not constitutionally be applied to pre-enactment earnings of a separated *H*. Obviously, the clearest property-taking would result from such retro-

*Paley v. Bank of America*<sup>336</sup> involved the issue of the retroactivity of a 1935 act<sup>337</sup> that was the legislature's answer to *Thornton*. The act was construed by the court to provide that when the decedent had acquired personal property while domiciled outside California that would have been community property if acquired while domiciled in California, the surviving spouse had testamentary disposition over half of that property. *H* and *W* came to California bringing pre-1936 property acquired by *H* in Illinois and Pennsylvania while he was married to *W*. *W* predeceased *H* testate in 1954. The court held that, notwithstanding the new statute, none of the pre-1936 property of *H* was subject to her will. Under *McKay* and *Thornton*, to permit *W* to appoint away half of this property would be a clear case of property-taking retroactivity, since at *W*'s death the property was still separately owned by *H*. Thus, to apply the statute to pre-enactment property of *H* would be an unconstitutional denial of due process.

However, in a passage of *Paley* critically important to the present inquiry, the court indicated its awareness that *Arnett*, not *Spreckels*, governs retroactivity cases involving statutes that do not seek to shift ownership from one person to another but to alter management and control powers over true (*i.e.*, post-1927) community property.

Appellant's [*W*'s executor's] principal argument that section 201.5 is not a deprivation of property without due process of law centers around the proposition that it is a reasonable exercise of the police power of the state. . . .

Appellant relies heavily on *Warburton v. White*, 176 U.S. 484 [20 S. Ct. 404, 44 L.Ed. 555] and *Arnett v. Reade*, 220 U.S. 311 [31 S. Ct. 425, 55 L.Ed 477, 36 L.R.A.N.S. 1040]. These cases are clearly distinguishable from the one at bar. They do not deal with the right of the Legislature to give to one spouse (wife) an interest in property in which, when it was acquired by the husband, *the wife got no vested interest*. Even in respect to community property they *do not deal with the enlargement of the wife's interest in the property* at the expense of an equivalent diminution of the husband's rights. . . . In *Arnett v. Reade, supra*, under the law of New Mexico the wife got a present vested ownership interest in community property when it was acquired. The Supreme Court held that a 1901 statute requiring the wife's concurrence to a conveyance of the community property by the husband before it could

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active application. Somewhat surprisingly, the state supreme court has granted a hearing in this case. No. 75-46 (Cal. Mar. 17, 1975).

336. 159 Cal. App. 2d 500, 324 P.2d 35 (1958).

337. Ch. 831, § 1, [1935] Cal. Stats. 2248.

be valid against her was constitutional; that it further protected her against alienation by the husband in fraud of her interest in the property and it did not take away any of the husband's vested interest in the property. . . .

*Prior to 1927, when the wife's interest in community property was a mere expectancy and not a present vested ownership right as it was in the jurisdiction in which the Warburton and Arnett cases arose, the holding in these cases was not persuasive upon our courts in California.*

. . . .

In the instant case, the entire rights to the property in question were fully vested in the respondent alone, solely and exclusively, at the time he acquired the property and still were vested in him alone when section 201.5 was enacted and when he came to California. Lillian at no time ever had any kind of interest in his property. The authorities cited by appellant seem to have little to do with our question—whether the wife who got no interest in the property when it was acquired can thereafter be given the right to dispose of it.<sup>338</sup>

*Paley*, even more strongly than *McKay*, shows that *Arnett* governs cases of retroactive changes in management and control law where the spouses are equal owners of the property at issue.

*Addison v. Addison*,<sup>339</sup> the last California Supreme Court decision on retroactivity of community property statutes, was a property-taking case. Under California's quasi-community property legislation of 1961,<sup>340</sup> common law separate property brought to California, which would have been community if acquired by a California domiciliary, in effect is converted into community property at divorce, for purposes of division between the spouses.<sup>341</sup> In *Addison*, *H* and *W* moved to California in 1949, bringing with them property *H* had acquired by onerous title during marriage in Illinois—common law separate property that was quasi-community property in California. After the quasi-community property legislation became effective, *W* obtained a divorce from *H* and sought a division of such property. The California Supreme Court held that 1961 legislation could constitutionally apply to *H*'s pre-enactment acquisition in Illinois.

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338. 159 Cal. App. 2d at 510-12, 324 P.2d at 42-43 (emphasis added).

339. 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

340. Ch. 636, §§ 1-23, [1961] Cal. Stats. 1838-45 (codified in scattered sections of CAL. CIV. CODE, CAL. PROB. CODE, and CAL. REV. & TAX. CODE).

341. CAL. CIV. CODE §§ 4800(a), 4803 (West Supp. 1974).

The court held that the taking of some of Mr. Addison's property at divorce was a proper exercise of the state's police power due to the state's "substantial interest" in protecting an innocent wife at dissolution of her marriage by way of an equitable property settlement.<sup>342</sup> This, of course, overruled *McKay* insofar as that case is viewed as having approved of a rule that property owned by a spouse could never be taken from him or her prior to death. The court's treatment of *H*'s retroactivity argument is curious:

Nor is the statute being applied retroactively. That is so because the legislation here involved neither creates nor alters rights except upon divorce or separate maintenance. The judgment of divorce was granted after the effective date of the legislation. Hence the statute is being applied prospectively.<sup>343</sup>

This passage of *Addison* cannot be taken seriously,<sup>344</sup> for if the court means what it says, the concept of retroactivity as it has been applied in California community property litigation has been abolished. Of course, amended Civil Code sections 5125 and 5127 give no rights to *W* to manage *H*'s earnings until after the effective date of the reform package. Under the quoted passage of *Addison*, if *W* were in 1975 to sell community property that was acquired by *H* in 1974 with his earnings, to validate her transaction would be to apply section 5125 prospectively. Litigants should not count on being able to escape retroactivity problems under the 1975 reform package in such a facile manner. The importance of *Addison* is that, even if management powers in a true community property system are somehow "property" wholly apart from the money, furniture, land, etc., that is being managed, the due process clause permits a reasonable impairment of such proprietary or vested interests.

The last reported case concerning retroactivity and California community property is *In re Marriage of Silvers*,<sup>345</sup> decided in 1972. At a time when *H* was extremely cruel to *W*, the California law gave *W* a cause of action for divorce and a right to be awarded more than

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342. 62 Cal. 2d at 567, 399 P.2d at 902, 43 Cal. Rptr. at 102.

343. *Id.* at 569, 399 P.2d at 904, 43 Cal. Rptr. at 104.

344. See N. LAY, TAX AND ESTATE PLANNING FOR COMMUNITY PROPERTY AND THE MIGRANT CLIENT 239-40 (1970) (*Addison* treatment of retroactivity issue is "judicial sleight of hand"); Knutson, *supra* note 215, at 270 (quoted definition of retroactivity is "unprecedented"); Marital Property, *supra* note 174, at 266-67 (quoted passage "side-stepped" retroactivity issue); Retroactive Application, *supra* note 215, at 520-21 (confusion caused by quoted treatment of retroactivity is "unfortunate").

345. 23 Cal. App. 3d 910, 100 Cal. Rptr. 731 (1972).

half the community property. In *Silvers*, by the time *W* obtained her divorce judgment in 1970, the new Family Law Act,<sup>346</sup> which prohibited an unequal division of community property,<sup>347</sup> had become effective. That Act was made specifically retroactive to pending divorce actions.<sup>348</sup> Although *Silvers* did not involve statutory changes in management and control, one of the reasons given by the court for rejecting *W*'s contention that the Family Law Act should not be applied retroactively is of the most importance to the fate of sections 5125 and 5127:

We cannot agree with appellant's [*W*'s] claim of a "vested right" to more than one-half of the community property. . . . Civil Code section 161a was in effect from the inception of the marriage until the repeal of that statute on January 1, 1970. It provided that "The respective interests of the husband and wife in community property during the continuance of the marriage relation are present, existing and *equal* interests . . . ." Civil Code section 5105, which has been in effect since the repeal of section 161a on January 1, 1970, contains identical language.<sup>349</sup>

In other words, former section 161a, enacted in 1927, gave notice that under a true community property system all rights and powers that were not shared equally by the spouses were not proprietary interests. The only "vested" or "proprietary" community property rights were the *equal* ownership rights of the spouses; thus, *W*'s claim to an unequal division did involve a "vested" right.

Perhaps the *Silvers* court can be chided for finding so much magic in the conclusory term "vested." But a closer analysis of the effect of the 1927 conversion to a true community property system supports the court's holding. The statute declares that it is "defining the respective *interests and rights* of husband and wife in community property."<sup>350</sup> The fundamental policy is equality. Powers and benefits that are distributed unequally between the spouses are not proprietary interests and do not even rise to the level of "rights" in property. In view of this section and the historical significance of the label "right

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346. CAL. CIV. CODE § 4000 *et seq.* (West 1970).

347. For a comparison of pre- and post-1969 law concerning the power of a divorce court to divide community property between the spouses, see Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A.L. REV. 1306 (1970).

348. Ch. 1609, § 29, [1969] Cal. Stats. 3360-61.

349. 23 Cal. App. 3d at 911-12, 100 Cal. Rptr. at 731-32.

350. Ch. 265, § 1, [1927] Cal. Stats. 484, now CAL. CIV. CODE § 5105 (West 1970). See note 235 *supra*.



of property" in retroactivity cases, no Californian since 1927 could have reasonably relied on the legislature's not altering aspects of community property law that distribute benefits unequally; no one could reasonably rely on the legislature's not directing that equalizing changes in the law apply to all post-1927 community property, no matter when acquired. Accordingly, any claim by a party that he or she relied on the legislature continuing the pre-1975 system of male management with respect to all acquisitions prior to the change in the law must be rejected as unreasonable.<sup>351</sup> Thus, pre-1975 management and control powers are necessarily "freely impairable" by equalizing legislation, and the courts need not, where post-1927 property is at issue in cases arising under amended sections 5125 and 5127, engage in balancing reliance interests against social policies favoring a retroactive change of the law.

#### 4. *The Origins and Effects of the 1927 Act*

Although former Civil Code section 161a (now section 5105) states with clarity that the property interests of the spouses in community property are "equal," thereby excluding discriminatory pre-1975 management powers from the category of vested property rights, it has been contended that the section is limited to tax cases.<sup>352</sup> Under this view, in all other contexts the pre-1927 forced-heir theory, whereby *H* is the exclusive owner of all community property, is still controlling in California. If this were so, *Spreckels*, as limited by *Addison*, would control the constitutional validity of the retroactivity provisions of Civil Code sections 5125 and 5127, not *Arnett*.

Of course, attorneys must always watch out for the fallacy of the transplanted category.<sup>353</sup> Just as the concept "procedural" means one thing in retroactivity cases and another in conflict-of-law problems,<sup>354</sup> it is possible that the term "respective interests of the husband and wife in community property," in the 1927 act,<sup>355</sup> which defines their proprietary interest, means one thing in the context of taxation and something else in community property retroactivity cases.<sup>356</sup> Although the

351. The courts usually uphold retroactive application of statutes where the legislature prior to enactment had indicated that a change in the law was likely. See Slawson, *supra* note 213, at 231-33; cf. Purvis v. United States, 501 F.2d 311 (9th Cir. 1974).

352. See note 386 *infra*. See also Schreter, "Quasi-Community Property" in the *Conflict of Laws*, 50 CALIF. L. REV. 206, 215 (1962).

353. See Hancock, *Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535 (1959).

354. Grant v. McAuliffe, 41 Cal. 2d 859, 865, 264 P.2d 944, 948 (1953).

355. See note 235 *supra*.

356. *I.e.*, that management and control is not a proprietary interest of the type §

1927 act provided that "this section shall be construed as defining the respective interests and rights of husband and wife in community property," the theory that it is limited to tax cases cannot be laughed off without analysis. However, a study of the events leading to enactment of former section 161a leaves no doubt that it was intended to apply to both tax and retroactivity cases. Moreover, it was intended to legislatively abrogate *Spreckels*.

a. *Income tax law pressure to abandon the forced-heir theory of community property*: The sixteenth amendment to the federal Constitution and a valid federal income tax law became effective in 1913.<sup>357</sup> From the outset, tax rates were progressive. In community property states, spouses attempted to ameliorate the impact of progressive rates where the earnings of one spouse alone provided the bulk of the income by having each spouse report half of the combined community income as his or her ownership interest.<sup>358</sup>

Assuming *H* had community income and *W* did not, the spouses could lawfully split this income on separate returns if *W* were as a matter of law the original owner of half the income.<sup>359</sup> If, on the other hand, she took her half interest by way of some sort of assignment from *H*, he had to report all the income.<sup>360</sup>

In 1920 an opinion by the United States Attorney General to the Secretary of the Treasury declared that splitting of community income by Texas spouses was permissible since Texas community property law

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5105 refers to when it comes to tax cases, but management and control is a proprietary (or vested) interest in retroactivity cases. *But see* Dagget, *The Modern Problem of the Nature of the Wife's Interest in Community Property—A Comparative Study*, 19 CALIF. L. REV. 567 (1931), discussing the effect of the New Mexico retroactivity decision, *Arnett v. Reade*, on the availability of income splitting of community earnings by one spouse for New Mexico couples: "[T]he wife's interest could hardly be vested as to the due process clause and not vested in regard to income tax purposes." *Id.* at 595.

357. *See* J. CHOMMIE, *FEDERAL INCOME TAXATION* 2-3 (2d ed. 1973).

358. *Id.* In the early 1920's where one spouse had \$100,000 of exclusively community income and the other had no income, the savings by income splitting was about \$10,000.

359. *Poe v. Seaborn*, 282 U.S. 101, 109 (1930). *Cf.* *Corliss v. Bowers*, 281 U.S. 376 (1930).

360. *See* *Corliss v. Bowers*, 281 U.S. 376 (1930). *Commissioner v. Harmon*, 323 U.S. 44 (1944), involved the question whether income could be split under Oklahoma's brief experiment with community property. It could not, held the court, because under Oklahoma law the community property system did not automatically attach to acquisitions during marriage by Oklahoma spouses unless the spouses contracted otherwise; rather, the Oklahoma spouses had to affirmatively opt into the community property system. The agreement by which this was done was viewed as an assignment of half the wage-earner spouse's income to the other spouse.

made *H* and *W* equal owners of income of both spouses.<sup>361</sup> In 1921 the Attorney General ruled that spouses in all the community property states except California were entitled to split community income because those states made *H* and *W* equal owners of community property.<sup>362</sup> In discussing why Washington spouses could income split, the Attorney General's opinion cites *Holyoke v. Jackson*<sup>363</sup> as establishing that a Washington *W*'s ownership interest was equal to *H*'s. *Holyoke* is the leading Washington case upholding retroactive application of statutes altering management and control to pre-enactment acquisitions. The basis of the *Holyoke* decision was that the Washington spouses were equal owners of community property, and *H* had greater management and control than *W*, not as a proprietary right, but as a legislatively granted power in trust. Certainly, the Attorney General saw no difference between what constituted the Washington spouse's equal-ownership interests for retroactivity cases and what constituted their proprietary interests in tax cases. The equality of ownership in *Holyoke*, a retroactivity case, carried over to the taxation setting. This relationship between the tax and retroactivity cases becomes even clearer in that portion of the opinion that refused to authorize income splitting by California spouses.<sup>364</sup> The case first mentioned and most often cited by the Attorney General is *Spreckels*. This decision, defining ownership for retroactivity purposes, was said to establish that in California "the husband had all the elements of absolute ownership of the community property; that the wife's interest was a mere expectancy . . . ."<sup>365</sup>

In March 1924, the Attorney General and Secretary of the Treasury added California to the list of states whose spouses qualified for income splitting.<sup>366</sup> However, shortly thereafter, the Secretary of the

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361. 32 OP. ATT'Y GEN. 298, 306-07 (1920).

362. 32 OP. ATT'Y GEN. 435, 458-61 (1920). The IRS Regulations of 1922 announced that spouses in all eight community property states except California were eligible for income splitting. T.D. 3295, art. 31, 24 TREAS. DEC. INT. REV. 207, 220 (1922).

363. 32 OP. ATT'Y GEN. at 456 (1920), citing *Holyoke v. Jackson*, 3 Wash. Terr. 235, 3 P. 841 (1882); See text accompanying notes 412-13 *infra*.

364. 32 OP. ATT'Y GEN. at 456-58 (1920).

365. *Id.* at 457.

366. T.D. 3569, III-1 CUM. BULL. 91 (1924). The opinion was based upon *Wardell v. Blum*, 276 F. 226 (9th Cir. 1921), which held that California community property could be treated for federal estate purposes as owned equally by the spouses. The *Wardell* court relied primarily on a California statute providing that for state inheritance taxes *W* does not take half the community property as an heir. *Arnett* was also cited for the proposition that *W*'s interest is more than an expectancy.

Treasury issued an opinion waffling on the question of income and estate tax splitting by California spouses, warning that a definitive decision by the United States Supreme Court would have to be obtained.<sup>367</sup> This definitive decision came in *United States v. Robbins*<sup>368</sup> in 1926. The California taxpayers had prevailed in the Ninth Circuit,<sup>369</sup> but the federal tax collector made an all-out, successful assault in the Supreme Court against tax splitting by Californians. Examination of the brief of the United States<sup>370</sup> makes clear that the Treasury's theory was that whatever ownership interest *W* had for retroactivity purposes was exactly the same interest she had for taxation purposes.

*Spreckels* was cited seven times by the government, including two direct citations for the proposition that a California *W* has no ownership interest in community property. In their brief, the taxpayers could only respond that *Spreckels* was erroneous; they did not even attempt to "distinguish" it as a nontaxation case.<sup>371</sup>

It is clear from *Robbins* that the Court accepted the government's contention that *W*'s ownership interest for retroactivity purposes had to be the same as her ownership interest for purposes of tax assessment. The Court noted that in some jurisdictions *W* is a vested owner of half the community property, citing *Arnett v. Reade*,<sup>372</sup> the Supreme Court decision holding that under New Mexico law statutory changes in management and control could be applied retroactively. The implication was clear that because of *Arnett*, New Mexico spouses could split community income in paying federal taxes. The Court then cited *Roberts v. Wehmeyer*,<sup>373</sup> noting that it "shows that *Arnett v. Reade* . . . would not be followed in [California]."<sup>374</sup>

Meanwhile, California spouses were seeking relief in the California courts in *Stewart*,<sup>375</sup> the declaratory judgment action by *W* against *H* seeking a declaration that she was an equal owner with *H* of California community property. The taxation motives of this suit were patent. Nothing suggests that the litigants thought it was possible

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367. T.D. 3670, IV-1 CUM. BULL. 19 (1925).

368. 269 U.S. 315 (1926).

369. 5 F.2d 690 (9th Cir. 1925).

370. See the condensation in 269 U.S. at 316-21.

371. 269 U.S. at 324 (where the taxpayers say *Spreckels* is erroneous).

372. See text accompanying notes 283-85 *supra*.

373. 191 Cal. 601, 218 P. 22 (1923). See text accompanying notes 276-86 *supra*.

374. 269 U.S. at 327.

375. 199 Cal. 318, 249 P. 197 (1926). See text accompanying notes 297-300 *supra*.

for *W* to be equal owner for tax purposes but not for purposes of retroactive application of statutory changes in management and control. The state Supreme Court in *Stewart* indiscriminately cited retroactivity and state taxation cases<sup>376</sup> as if they dealt with the same ownership concept, concluding, of course, that *W*'s interest was nothing more than an expectancy.

It was against this background that Civil Code section 161a was enacted in 1927, giving *W* co-equal ownership with *H* of all community property.<sup>377</sup> The immediate objective of the legislature was obviously to obtain income splitting benefits for California taxpayers; but to achieve that end it was necessary to abrogate *Spreckels* and the other retroactivity cases dealing with *W*'s ownership of community property.<sup>378</sup> To make certain that Californians could split income for tax purposes, *W* had to become a true half owner of community property. Any statute that was intended to make *W* an equal owner for tax purposes but not for other purposes would surely have been held a sham by the United States Supreme Court, and the desired tax relief would not have been achieved.<sup>379</sup> The Treasury obviously understood that the 1927 legislation was not a sham but an actual adoption in California of a true community property system, for it stipulated in *United States v. Malcolm*<sup>380</sup> that on the basis of the 1927 statute California spouses could split income on federal tax returns like spouses in the other community property states. The United States Supreme Court agreed.

b. *The government's contentions in Babb v. Schmidt: Is Spreckels still alive and well?*: Notwithstanding the clear legislative purpose of the 1927 act, just a few months before the 1975 California community property reforms became effective, the United States argued before the Ninth Circuit that section 161a had not abrogated the *Spreckels* holding that *H* was the sole owner of community property and won the case. In *Babb v. Schmidt*<sup>381</sup> *H* owed federal income taxes for 1944-45. In 1961 *H* married *W*, and in 1970 the Internal Revenue Service levied on community property of this marriage pursu-

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376. See, e.g., 199 Cal. at 334, 249 P. at 204 (discussion of *Estate of Moffitt*).

377. See note 235 *supra*.

378. See *Wife's Interest*, *supra* note 280, at 417 (the 1927 legislation was "an attempt to comply with the doctrine of the supreme court as set forth in the *Spreckels* and *Stewart* cases").

379. This was the fate of Oklahoma's optional community property system. See note 360 *supra*.

380. 282 U.S. 792, 794 (1931).

381. 496 F.2d 957 (9th Cir. 1974).

ant to a statute that creates a lien for the IRS "upon all property and rights to property" belonging to a taxpayer-debtor.<sup>382</sup> *W* sought to have her half interest released from the lien on the ground that post-1927 community property was owned equally by the spouses. *W* argued that, under section 161a and its successor, section 5105, *H* had no property interest in her half of the community property; his power to deal with it, including the power to pay his debts with it, was a nonproprietary power in trust.

The government took the position that *Grolemund v. Cafferata*,<sup>383</sup> held to the contrary.<sup>384</sup> In *Grolemund*, the government contended, *Spreckels* was cited with approval and thus was still good law in California with respect to all community property. The brief of the United States asserted that in *Grolemund* the court did not depart from the conclusion reached in *Spreckels*, notwithstanding the 1927 act, which declared the interests of *H* and *W* to be present, existing, and equal. *Grolemund*, it asserted, adhered to the result reached in *Spreckels* because the court concluded that later statutory provisions had not altered the fundamental nature of *H*'s property right, at least in a case where a creditor seeks to collect a separate debt of *H* alone.<sup>385</sup>

We submit that the decision in *United States v. Malcolm* [282 U.S. 792 (1931), authorizing income splitting by California spouses on the basis of section 161a] . . . should not be regarded as requiring a plainly wrong result in the present case. It dealt with the question of who must file an income tax return, rather than with the question of what assets or property may be levied to satisfy a federal income tax liability.<sup>386</sup>

The brief then noted that the appellee would not be so "presumptuous" as to suggest *Malcolm* was wrong but that "one can hardly fail to note" that *Malcolm* was a two-word per curiam opinion. "Evidently," argued the government, a wish to treat California taxpayers the same as those

382. INT. REV. CODE OF 1954, § 6321. A similar statute with regard to IRS levies is INT. REV. CODE OF 1954, § 6331. In *Aquilino v. United States*, 363 U.S. 509 (1960), these statutes were interpreted to refer to "property and rights to property" as defined by state law; a federal definition of property for purposes of income tax collection was rejected as "unsound because it ignores the long-established role that the states have played in creating property interests." *Id.* at 513 n.3; see also *United States v. Durham Lumber Co.*, 363 U.S. 522 (1960).

383. 17 Cal. 2d 679, 111 P.2d 641 (1941).

384. Brief for Appellee [United States] at 10, *Babb v. Schmidt*, No. 71-2621 (9th Cir. 1974) [hereinafter cited as Brief].

385. *Id.* at 13-14.

386. *Id.* at 15.

from other community property states was responsible for the Supreme Court's acceptance of the government's stipulation that section 161a brought California in line with Washington and other community property states where income splitting had been approved.<sup>387</sup> The brief then lamented that at the time of *Malcolm* neither the government nor the Court had the benefit of the decision in *Grolemund v. Cafferata*, where "the Supreme Court of California minimized the significance of the 1927 statute and adhered to the long-settled view that the husband's rights are predominant."<sup>388</sup>

Attorneys and taxpayers who feel that the IRS will stop at nothing to squeeze the last dime out of one's pockets will not be surprised at this astounding argument. But in no way does *Grolemund* judicially repeal or construe away the effects of section 161a. In *Grolemund*, a tort victim obtained a judgment against *H* for negligence which occurred during marriage. The issue was whether the judgment creditor could levy on post-1927 community property. Apparently arguing that the tort was *H*'s separate responsibility because his negligence did not occur in the course of a community-related endeavor,<sup>389</sup> *W* contended that since she was an equal owner of the community property it could not be taken by the judgment creditor unless *W* too were liable.

The *Grolemund* court cited *Spreckels* approvingly for the proposition that all of *H*'s creditors could reach the community property subject to *H*'s management.<sup>390</sup> This is the crux of the managerial system of creditors' rights, followed in five of the eight American community property states and, according to the recent *Creech* decision of the Louisiana Supreme Court, also the rule in Spain.<sup>391</sup> The managerial system has in general always been part of community property law in California,<sup>392</sup> and simply because the legislature in 1927 switched from a

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387. *Id.* at 15-16.

388. *Id.* at 16. After this government attack on *Malcolm*, tax attorneys may not feel entirely secure in advising California spouses that they can split community income on separate returns for years before 1975 or view community property as owned equally by the spouses in preparing estate and gift tax returns for pre-1975 deaths and donations.

389. See note 185 *supra* regarding the "separate tort" concept as developed in Arizona, Washington, and New Mexico.

390. 17 Cal. 2d at 682, 111 P.2d at 643.

391. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497, 504-09 (La. 1973). See text accompanying note 248 *supra*. But see PRINCIPLES, *supra* note 223, §§ 155, 161, taking the position that Washington and Arizona with their community-vs.-separate debt system of creditors' rights rather than Louisiana with its managerial system are the American states most closely following Spanish law.

392. In addition to *Grolemund*, see *Weinberg v. Weinberg*, 67 Cal. 2d 557, 563, 432 P.2d 709, 711, 63 Cal. Rptr. 13, 15 (1967); *Street v. Bertolone*, 193 Cal. 751, 754,

bastard forced-heir system to a true community property system could hardly be viewed as evincing an intent to depart from the principles of the Spanish system that *H* was the sole manager of community property and could use it to pay his debts. The *Grolemund* court properly observed

[t]hat the addition in 1927 of section 161a, defining the interests of the spouses in community property, did not change the rule vesting in the husband the entire management and control of the community property is manifest by the express recognition accorded sections 172 and 172a in the later statute.<sup>393</sup>

Not only does the law of Spain as described by the Louisiana Supreme Court in *Creech* make clear that there is nothing antagonistic between equal ownership of community property by *H* and *W* and management by one spouse with a power to apply the property to pay his or her debts, but both principles were for many years simultaneous parts of the law of Idaho and Texas.<sup>394</sup> The reason that both principles can be accommodated in the same system is that a spouse's management powers in a true community property system are not "property" rights—not incidents of ownership—but are nonproprietary powers.<sup>395</sup>

226 P. 913, 914 (1924); *Tibbetts v. Fore*, 70 Cal. 242, 245, 11 P. 648, 649 (1886); *Adams v. Knowlton*, 22 Cal. 283, 288 (1863); *Van Maren v. Jonson*, 15 Cal. 308, 312 (1860). See also § 1 of the Fourth Act in text accompanying note 121 *supra*.

393. 17 Cal. 2d at 684, 111 P.2d at 643. Sections 172 and 172a of the Civil Code, acknowledged in § 161a, were the basic male-management provisions.

394. The principle that the spouses are equal owners of community property by halves is established in *Hopkins v. Bacon*, 282 U.S. 122 (1930) (Texas law); *Kohny v. Dunbar*, 21 Idaho 258, 121 P. 544 (1912); *Wright v. Hays' Adm'r*, 10 Tex. 130, 133 (1853). All *H*-managed community property is liable for all of *H*'s debts, including such "separate" debts as his antenuptial obligations. TEX. FAM. CODE § 5.61(c) (1975); W. BROCKELBANK, *THE COMMUNITY PROPERTY LAW OF IDAHO* 270 (1962), citing *Holt v. Empey*, 32 Idaho 106, 178 P. 703 (1919); 1 SPEER'S MARITAL PROPERTY RIGHTS IN TEXAS § 375 (4th ed. E. Oakes ed. 1961), citing, *inter alia*, *Taylor v. Murphy*, 50 Tex. 291 (1878).

395. See text accompanying notes 412-16 *infra*. In view of their reliance in the *Babb* brief on the historical predominance of the male in California community property, one must wonder how the government attorneys would characterize ownership of post-1951 and pre-1975 earnings of *W* and her community property personal injury damages. *W*'s management of such property was somewhat precarious. If it became commingled, her management was lost to *H*. In addition, *H* had, under former CAL. CIV. CODE § 5124, a form of concurrent management over the personal injury damages of *W*, since he could draw on them to pay expenses arising out of the accident. Would the government, consistent with its perception that *H*-managed property was owned solely by *H*, view *W* as sole owner of her post-1951 earnings and personal injury damages since, prior to commingling, she could draw on such property to pay all her debts? Would *H* have a mere expectancy? Would the government view such property as owned by the spouses by halves, or does it view the concept of "equal" ownership in § 5105 as completely eliminated by *Grolemund*?



If management powers were "property," then male management simply could not exist in a true community property system where *H* and *W* are equal proprietary owners by halves. But when the law views management powers as nonproprietary licenses or powers in trust,<sup>396</sup> equal ownership, one of the cardinal tenets of a true community property system,<sup>397</sup> is not compromised.

The only support for the government's distortion of *Grolemund* in *Babb* (i.e., a resurrection of *Spreckels* despite section 161a) is a short passage in the *Grolemund* opinion discussing the case of *Smedberg v. Bevilockway*.<sup>398</sup> *Smedberg* had held that *W*'s creditors could not reach *H*-managed post-1927 community property. Said the *Grolemund* court:

Though the court in the *Smedberg* case did not discuss the effect of section 161a, it reasonably can be inferred from that decision that the District Court of Appeal was of the opinion that section 161a of the Civil Code does not change the wife's interest to a *vested one so as to give her creditors the right of sequestration by attachment, execution or any other legal proceeding*.<sup>399</sup>

Given that the holdings of both *Smedberg* and *Grolemund* were that male management and the managerial system of creditors' rights were not abrogated by section 161a, it was not necessary for the court to opine as to whether *W* had a "vested" right in post-1927 community property. In any event, what the brief of the United States in *Babb* overlooked is the language italicized above: *W*'s interest is not vested so as to alter the managerial system of creditors' rights. This hardly means it is not vested for every other purpose. The interest of a cestui que trust is no less "vested" just because the trust instrument may preclude his or her creditor from carting away the trust corpus. Similarly, *W*'s interest in pre-1975 community property was no less "vested" just because it was subject to management by *H*, who had been given by the legislature powers in trust to act upon the entire community property, including the power to use it to pay his debts.

The passage from *Grolemund* using the term "vested" in discussing *Smedberg* is followed by another use of "vested," which helps to

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396. E.g., *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925); *Holyoke v. Jackson*, 3 Wash. Terr. 235, 3 P. 841 (1882). See text accompanying notes 412-16 *infra*.

397. Vaughn, *The Policy of Community Property and Interspousal Transactions*, 19 BAYLOR L. REV. 20, 47 (1967).

398. 7 Cal. App. 2d 578, 46 P.2d 820 (1935).

399. 17 Cal. 2d at 686, 111 P.2d at 644 (emphasis added).

clarify the quoted passage. In explaining *W*'s argument on appeal in *Grolemund*, the court said that *W* "urges that the wife in 1927 was given a vested right in and to the community property, which no act of the husband could affect."<sup>400</sup> Thus, *W* was using the term "vested" on appeal in the sense that her half interest in the community property was not even subject to *H*'s management. Obviously, this was not the legislature's intent, and the primary holding of *Grolemund* is unassailable:

[T]he legislature did not intend by enactment of section 161a to alter the situation in regard to the husband's right of full management and control of the community property.<sup>401</sup>

Indeed, the *Grolemund* court noted that *W* did have a property interest in post-1927 community property that entitled her to report half the community income on a separate tax return. But, the court accurately noted, this had

no bearing on the totally different situation presented here, requiring determination of whether the wife's interest is such as will exclude the theory that the husband may manage and control as well as create a liability against community property.<sup>402</sup>

An important aspect of the pre-1975 law that the government in *Babb* overlooked is that, when *H* decides to use community property to pay his "separate" debts,<sup>403</sup> he is simply making an investment of the community funds, just as he does when he loans community funds or buys a second mortgage. There is a change of form from money to other property consisting of a cause of action. In the case of payment by *H* of his separate debts, the community (and therefore *W* as to half) is given a cause of action against *H* for reimbursement of the community funds so expended that can be asserted at dissolution of the community.<sup>404</sup> In the case of a loan or mortgage the return to the com-

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400. *Id.* at 687, 111 P.2d at 645. Cf. *McDonald v. Senn*, 53 N.M. 198, 204 P.2d 990 (1949), where the majority seemed to view California's 1927 act as a nullity, without realizing that subsequently in *Weinberg* (see text accompanying notes 86-92 *supra*, 476-81 *infra* and note 404 *infra*) California would give *W* a reimbursement claim where *H* uses community property to pay debts that did not benefit *W* or the community.

401. 17 Cal. 2d at 687, 111 P.2d at 645.

402. *Id.* at 689, 111 P.2d at 646.

403. *I.e.*, in the Washington-Arizona sense. See cases cited in notes 86, 185 *supra*.

404. *Weinberg v. Weinberg*, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967). In *Weinberg* *H* had used community funds to pay alimony and child support obligations arising out of a prior marriage. Upon his divorce from *W-2* she asserted that the community should be reimbursed from *H*'s separate funds for the amount so paid. The court articulated the rule, generally followed in managerial-system states, that the community can claim reimbursement from *H* for payment of his separate debts:

munity is either interest or a cause of action against a third party. When *H* pays his separate debts with community property, the return to the community is at the least the improvement of his credit rating, which may enable him to increase his community earnings.<sup>405</sup>

It is therefore clear that *Grolemund* does not stand for the proposition that *H*'s power to use post-1927 property to pay his separate debts divests *W* of any interest in community property in the way that *H*'s pre-1891 power to make nonfraudulent gifts of community property reduced her forced heir's share. There is merely a change in form of the community asset from money to a cause of action against *H* for reimbursement.

In sum, nothing in *Grolemund* supports the contention of the United States in *Babb* that, despite enactment of section 161a in 1927, *Spreckels* was still good law in holding that there was "vested in the husband with reference to the community property, all the elements of ownership, and in the wife none."<sup>406</sup>

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To hold otherwise would be to permit the authority of the husband in controlling the community property, given him in the interest of greater freedom in its use and for its transfer for the benefit of both himself and his wife, to become a weapon to be used by him to rob her of every vestige of interest in the community property with which the law has expressly invested her.

*Id.* at 563, 432 P.2d at 712, 63 Cal. Rptr. at 16. The court refused, however, fully to apply the general rule to this particular case, erroneously holding that the support obligations were not entirely separate because they had remained at a high level as a result of *H*'s high level of community income. To that extent the debts were held to be a community obligation.

It may often be the case that because a spouse with separate property also has considerable community property under his or her control the spouse will spend more freely and incur more separate debts. Since by definition the separate debts do not benefit the community and the other spouse as a member of the community (*see, e.g.,* *Babcock v. Tamm*, 156 F.2d 116, 119 (9th Cir. 1946)), the policies against marital marauding so cogently stated in *Weinberg* require that full reimbursement be made to the extent the spouse paid the separate debts with community funds, even though the spouse would not have run up so many separate debts except for the economic cushion of extensive community money. Dividing a debt as part separate, part community, is an innovation of *Weinberg* without apparent precedent in the other community property states. The theory of divisibility is sound. It should have been applied in *Weinberg*, however, only if the community benefited from the separate investment, *i.e.*, if *H*'s children gave the pleasure of family living to both *H* and *W-2* by spending a month out of the year living with them.

405. There appears to be no direct authority that interest on the amount reimbursed may be awarded. In states such as Louisiana where rents and profits arising from *H*'s ventures with his separate property are community, failure to award interest may be reasonable because the payment of *H*'s separate debts will often generate more community rents and profits from *H*'s separate estate.

However, it is likely that California would now award interest in a reimbursement case of the *Weinberg* variety. *See* notes 478-79 and accompanying text *infra*.

406. 116 Cal. at 342, 48 P. at 229, *quoted in* Brief, *supra* note 384, at 12.

It seems unlikely that by holding in favor of the United States in *Babb* the Court of Appeals for the Ninth Circuit accepted the government's argument. The court accurately cited *Grolemund* for the proposition that Mr. Babb's creditors could reach all the community property managed by him because California rejected the Arizona-Washington rule of characterizing debts as separate or community during marriage.<sup>407</sup> The holding of the court is this:

[W]hile creditors' rights can be less extensive than a debtor's property right (under state law there may be property rights that a creditor is not permitted to reach), they can hardly be more extensive. If California law makes the wife's share of the community property available to creditors of the husband, California law has by the same rule implicitly given the husband rights in that property sufficient to meet the requirements of 26 U.S.C. § 6321.<sup>408</sup>

*Spreckels* was not cited. It may be that the court in *Babb* interpreted "property or rights to property" in the federal tax lien statute as including all assets that by state law a debtor could use to pay his debts, regardless of whether state law viewed him as having any proprietary interest in that property. This would be consistent with numerous federal court decisions construing the same statute, where tenancy by the entirety is involved, to give the IRS the same rights to reach such property as ordinary creditors have.<sup>409</sup>

If *Babb* is not decided on the basis that the federal tax lien statute gives the IRS rights as broad as local creditors have against a debtor without regard to California's concepts of how community property is

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407. 496 F.2d at 958-59.

408. *Id.* at 960.

409. These cases of liability under the federal tax statutes for the debts of one spouse of property held in tenancy by the entirety have turned on state law of creditors' rights and not on such property ownership issues as whether the spouses are seized *per tout et non per my*, or whether some distinct entity, the *H-W*, which is neither spouse, owns the property. *Pilip v. United States*, 186 F. Supp. 397 (D. Alas. 1960), permitted the federal tax collector on a judgment against *H* to reach precisely what the court felt Alaska law permitted an ordinary creditor of a spouse to reach when property held in tenancy by the entirety was levied on: he could reach half the profits until the entirety was terminated by dissolution of marriage. And, if the entirety was dissolved by the death of *W*, he could reach the full fee. If the entirety was terminated by *H*'s death, he could reach nothing, and receipt of half the profits would terminate. In *United States v. Ragsdale*, 206 F. Supp. 613 (W.D. Tenn. 1962), the United States was able to seize *H*'s survivorship interest in the entirety because that was what *H*'s ordinary creditor could reach under state law. Other cases dealing with liability of property held in tenancy by the entirety include *United States v. American Nat'l Bank*, 255 F.2d 504 (5th Cir. 1958) (Florida law); *United States v. Hutcherson*, 188 F.2d 326 (8th Cir. 1951) (Missouri law).

owned by the spouses, it is erroneous. The Ninth Circuit has no more power than the California Supreme Court to judicially repeal Civil Code section 5105.<sup>410</sup> Yet only by a judicial repeal of the 1927 act could *H*'s management powers over most post-1927 and pre-1975 community property be "property" or give him a "property interest" in all of the community property. The statute requires a holding that the property interests of the spouses are "equal." Absent a judicial repeal of the statute, management powers must be something less than "proprietary." Not only does the language of section 5105 so require it, but, as noted previously, the reasons for its enactment clearly show that the legislature wished to scrap the *Spreckels* doctrine, which has denied income-splitting benefits to Californians, and to adopt the system of community property obtaining in such states as Texas and Washington where income splitting was allowed.

In dealing with the constitutionality of retroactive application of statutory changes in management and control of post-1927 community property, California courts will proceed under the principles applied by the courts in Washington, New Mexico, and Texas.<sup>411</sup> The leading case is *Holyoke v. Jackson*,<sup>412</sup> where the Washington territorial legislature had modified *H*'s management powers by requiring him to obtain *W*'s consent to sell certain community properties. The question was

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410. The most surprising aspect of *Babb* is that the court did not even cite, let alone discuss, the 1927 equalizing statute, although that was the primary authority relied on by *W*. Since § 5105 makes *H*'s and *W*'s proprietary interests in community property equal, it follows that the *Babb* court would have permitted the United States to reach all the community property if *W* were the debtor, even though she had no management over the property and her ordinary creditors could not reach it. The federal tax collector disregards all state law provisions in the nature of an exemption that insulate property "owned" by a debtor from his or her creditors. *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970) (Washington community property rule insulating *H*'s half of the community property from his "separate creditors"); *In re Ackerman*, 424 F.2d 1148 (9th Cir. 1970) (*accord* under Arizona law). If *H* has an ownership interest in all the community property, then § 5105 demands that *W* also have an ownership interest in all the property in order to maintain equality of proprietary interests. This means that both spouses would be, in the English common law terminology, seized *per tout*. Courts that have analogized community property to tenancy by the entirety have recognized that there are significant differences. See, e.g., *La Tourette v. La Tourette*, 15 Ariz. 200, 137 P. 426 (1914). And it seems clear under California law that the spouses are viewed as each owning half the community property, not all of it concurrently. See, e.g., *People v. Lockett*, 25 Cal. App. 3d 433, 102 Cal. Rptr. 41 (1972); CAL. CIV. CODE § 5127.5 (West Supp. 1974) (referring to *W*'s "share" of the community property, obviously only one half).

411. See *Paley v. Bank of America*, 159 Cal. App. 2d 500, 324 P.2d 35 (1958), discussed in notes 336-38 and accompanying text *supra*.

412. 3 Wash. Terr. 235, 3 P. 841 (1882).

whether the act could apply to a subsequent sale of property that had been acquired before the change in the law. The court held it could, noting that *H*'s power of disposition was "a mere power" conferred upon him as head of the community in trust for the community. The legislature, therefore, had the authority to take it from *H* alone and assign it to *H* and *W* jointly.<sup>413</sup>

Another leading case is *Arnold v. Leonard*,<sup>414</sup> upholding a 1913 act of the Texas legislature that switched from *H* to *W* management and control of those community properties consisting of rents and profits from *W*'s separate estate<sup>415</sup> and provided that such community property would not be liable for debts contracted by the husband. The Texas Supreme Court viewed *H*'s powers as those of a trustee and therefore not proprietary.<sup>416</sup>

As to all post-1927 property, California law must necessarily be the same as declared in *Holyoke* and *Arnold*. That is, *H*'s prereform management powers are mere powers in trust and not "property" interests. There is nothing arbitrary, as there was in *Spreckels*, in giving *W* equal management and control of post-1927 community property, since she is the equal owner of it. Seldom will husbands be able to prove that they acquired post-1927 community property or dealt with it before 1975 in reliance on continuation of the male-management system, despite *W*'s equal ownership. If there are husbands in California

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413. [Community] property must be procurable, manageable, convertible, and transferable in some way. In somebody must be vested a power in behalf of the community to deal with and dispose of it. . . . Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband and lay it upon the husband and wife together. As the husband's "like absolute power of disposition of his own separate estate" bestowed by the ninth section of the act of 1873 was a mere power conferred upon him as member and head of the community in trust for the community, it was perfectly competent for the legislature of 1879 to take it from him and assign it to himself and his wife conjointly.

*Id.* at 239, 3 P. at 842 (emphasis added). See also *Martinez y Nadal v. May*, 5 P.R.F. 582, 586-87 (1909). Cross, *supra* note 12, at 551-52, states that the *Holyoke* theory in Washington enabled its equal-management reform legislation to apply to pre-enactment acquisitions.

414. 114 Tex. 535, 273 S.W. 799 (1925); *accord*, *Scott v. Scott*, 170 S.W. 273 (Tex. Civ. App. 1914).

415. In California such rents and profits are separate property. CAL. CIV. CODE § 5107 (West 1970). But this difference in characterization has no bearing on the applicability of the Texas courts' view of the power of the legislature to alter the rules of management and control and apply the new law to pre-enactment community acquisitions.

416. 114 Tex. at 545, 273 S.W. at 804.

who did change their position in reliance on the freezing of male management of all community property acquired before the change in the law, such reliance is probably unreasonable in view of the fact that the 1927 legislature clearly rejected *Spreckels* in favor of such cases as *Holyoke* and *Arnold* to obtain income-splitting benefits for Californians. In addition, certainly after *Sail'er Inn, Inc. v. Kirby*,<sup>417</sup> no husband could reasonably rely on the continuation of a management system that discriminated on the basis of sex and therefore smacked of unconstitutionality.<sup>418</sup>

What is true of reasonable reliance by husbands is equally applicable to any reliance claims by creditors of *H* or *W*. They could not blind themselves to the legislature's power to convert to an equal-management system that would be applicable to post-1927 community property whenever acquired.

For these reasons, *H*'s pre-1975 superior management powers of most post-1927 community property (and *W*'s power over her uncommingled earnings) were freely impairable by the legislature. Therefore, the retroactivity provisions of amended Civil Code sections 5125 and 5127 do not deny due process of law. It is difficult to imagine instances in which a spouse or a spouse's creditor can prove that, even though California converted in 1927 to the Washington-Texas approach to legislative control over rules of management, he or she reasonably relied on the rules of management and control applicable when specific community property was acquired remaining "frozen" with respect to that property. Like tax rates, rules of management became in 1927 something the legislature was known to have the power to alter. Absent any reasonable reliance on the pre-1975 law having been frozen with respect to pre-1975 acquisitions, there is no occasion to balance reliance interests of a spouse or creditor against the social policies in favor of applying equal management to all post-1927 community property.<sup>419</sup> There are no "vested" rights to management of post-1927 community property.<sup>420</sup>

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417. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); see note 5 *supra*; cf. *Loop v. State*, 240 Cal. App. 2d 591, 49 Cal. Rptr. 909 (1966) (where law is under attack in the legislature one cannot rely on its remaining unchanged).

418. It is true, as pointed out in note 106 and accompanying text *supra*, that equal management was not the only possible cure for the sex discrimination existing in the pre-1975 law regarding management and control; but some correction of the inequity was necessary, and equal management was one logical answer.

419. The courts did not engage in such balancing in either *Holyoke* or *Arnold*. See also *Dillard v. New Mexico State Tax Comm'n*, 53 N.M. 12, 201 P.2d 345 (1949).

420. Insistence on viewing management power itself as property will raise some

### 5. *The Effect of the 1927 Act on W's Role in Management*

The 1891, 1901, and 1917 revisions of the law of management and control were applied prospectively to all post-enactment acquisitions. Thus, in dealing with those acts, the courts had no occasion to discuss the effect of the 1927 legislation establishing a true community property system in California. That issue would have arisen in a case testing the validity of applying to pre-enactment property the 1951 statute,<sup>421</sup> empowering *W* to manage her uncommingled community earnings, and the 1971 statute,<sup>422</sup> expanding her management so she could support children by a prior marriage. There is no reported case concerning retroactivity of the 1951 and 1971 statutes.<sup>423</sup> The Washington-Texas approach to retroactivity of changes in the law of management should apply in such a case, and this would obviously not require

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peculiar problems. If *H* does not exercise his right under CAL. CIV. CODE § 5125(d) (West Supp. 1975) to exclude *W* from sharing management of his business, will he not have made a gift of property to her? How shall the gift be valued for gift tax purposes —by the value of the property *W* can now manage, as in *Commonwealth v. Terjen*, 197 Va. 596, 90 S.E.2d 801 (1956) (taxing *H*'s "gift" to *W* of her half of *H*-managed community property)?

Unlike Virginia in *Terjen*, many common law states immediately convert community property to a form of English common law property when *H* and *W* move from a community property state and take up domicile in the common law state. See *Quintana v. Ordonez*, 195 So. 2d 577 (Fla. Ct. App. 1967); *Depas v. Mayo*, 11 Mo. 202 (1848); *Edwards v. Edwards*, 108 Okla. 93, 233 P. 477 (1924); cf. *Stone v. Sample*, 216 Miss. 287, 62 So. 2d 307 (1953). The dissent in *In re Kessler's Estate*, 177 Ohio St. 136, 144, 203 N.E.2d 221, 226 (1964), would have converted community property on change of domicile to tenancy in common, each spouse controlling his half interest. But if management were "property," Ohio probably could not constitutionally do this, for it would result in a "taking" of *W*'s equal management over *H*'s half and *H*'s equal management over hers. It seems unlikely that giving a spouse exclusive control over a half of the property is sufficient compensation for the taking to eliminate the due process problem. Probably, Ohio would have to integrate into its system of property rights and economic regulation a form of cotenancy subject to California-style equal management, a system in conflict with Ohio's scheme of property ownership. This is a senseless burden for California to foist on sister states.

421. See note 228 *supra*.

422. See note 229 *supra*.

423. But see *People v. Lockett*, 25 Cal. App. 3d 433, 439-40, 102 Cal. Rptr. 41, 44-45 (1972). The case concerned a predecessor to the 1971 act (see note 229 *supra*) making *W*'s half interest in *H*-managed property liable for support of *W*'s children by a prior marriage. The court said the statute "abridged the nonadoptive stepfather's 'management and control' of his wife's community property interest in his earnings," but this "provision was patently sound and reasonable." The court quoted from § 5105 the rule that the spouses' interests in community property were "present, existing, and equal." Why, unless the court had in mind constitutional problems of retroactive application of the statute, would the court have asserted that the abridgement of *H*'s management was "sound and reasonable"?



overruling any California decisions<sup>424</sup> since, prior to the 1975 equal-management reforms, the 1951 and 1971 statutes offered the only opportunity for determining whether the Washington-Texas theory became part of California law with the adoption of a true community property system in 1927.<sup>425</sup>

Two commentators<sup>426</sup> have, however, taken a different view as to the effect of the 1927 legislation on a spouse's management powers in California. Their theory is that before 1927 *H*'s management power was a vested, proprietary interest and that the 1927 act simply made *W*'s management powers vested proprietary interests as well. *W*'s powers now could not be cut back by legislation applying to pre-enactment property.

In 1927 *W*'s management powers consisted of the right to veto gifts of community property and sales of community realty and household furnishings. Since section 161a declared that the proprietary interests of *W* and *H* in community property were "equal," the commentators' theory permits recognition of *H*'s powers to control such gifts and sales as vested, proprietary interests. But the mandate of equal proprietary interests of *H* and *W* compels the further conclusion that all other management powers of *H* in 1927 had to be downgraded by section 161a to nonproprietary powers in trust under the Washington-Texas theory. Otherwise the proprietary interests of *H* and *W* would not be equal.

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424. Bonanno, *supra* note 36, at 111-12, advocates employing the Washington-Texas theory in testing the constitutionality of applying the 1975 reforms to pre-enactment acquisitions but says this requires overruling an "existing body of California case law." Apparently he means the *Spreckels* line of cases, but they dealt with forced-heir community property and are not on point when true community property is at issue.

425. This was the view of Kirkwood, *The Ownership of Community Property in California*, 7 S. CAL. L. REV. 1, 16 (1933). See also *Wife's Interest*, *supra* note 280, at 417-18; cf. Knutson, *supra* note 215, at 272-73.

426. "Prospective" Application, *supra* note 215, at 483; Comment, *Community and Separate Property: Constitutionality of Legislation Decreasing Husband's Power of Control Over Property Already Acquired*, 27 CALIF. L. REV. 49, 50, 56-57 (1938); accord, ARMSTRONG, *supra* note 231, at 591.

A series of articles dealing primarily with property-taking statutes that shift not management powers but actual ownership of the fee, and are thus not directly pertinent to the point at issue, seems to treat *Spreckels* as if it also were a property-taking case. *Marital Property*, *supra* note 174, at 257-60, 266; *Retroactive Application*, *supra* note 215, at 515, 517 (as a student editor of this piece in 1966 I accept the blame for mischaracterizing *Spreckels*). Cf. Bodenheimer, *Justice Peters' Contribution to Family and Community Property Law*, 57 CALIF. L. REV. 577 (1969); Bonanno, *supra* note 36; Schreter, "Quasi-Community Property" in the Conflict of Laws, 50 CALIF. L. REV. 206 (1962); Leflar, *Community Property and Conflict of Laws*, 21 CALIF. L. REV. 221, 227-28 (1933).

Then in 1951, when *W* was given control of her uncommingled earnings, *H*'s long-existing similar power over his uncommingled earnings could be viewed as elevated to a proprietary right, for equality of proprietary interests would be maintained. It would follow from this that the equal management reforms of 1975 could apply to pre-enactment acquisitions with one exception: it would be unconstitutional to take from *H* and *W* exclusive management of his or her uncommingled earnings.<sup>427</sup>

There are two flaws in this argument. First, as has been shown, *Spreckels* and its progeny did not establish that *H*'s pre-1927 management powers were vested, proprietary rights. Second, it seems clear that the 1927 legislature sought to obtain tax benefits of income splitting on the *same* theory that had succeeded for Washington and Texas spouses, not some new and untested form of ownership whereby the property itself plus shared management powers were equally owned, proprietary rights of *H* and *W*, while *H*'s greater powers were nonproprietary powers in trust.<sup>428</sup>

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427. The same would be true probably of community property personal injury damages, although the analysis as to them is complicated by the fact that under former CAL. CIV. CODE § 5124 *W*'s management of such funds awarded for her injuries was not exclusive. *H* could draw on them to pay expenses arising out of *W*'s injuries and to reimburse himself for such expenses he had paid. See note 228 *supra*.

428. If the 1927 act had not adopted the Washington-Texas theory, then any later statutory change giving *W* exclusive control over part of the community property (as was done in 1951) would have made income splitting impermissible with respect to gains from that property prior to Congress' 1948 legislation empowering spouses in all states to split income. If, for example, *W* were given before 1948 management of her own uncommingled earnings, the commentators' theory says this is a vested, proprietary right. *W*'s interest therefore is not equal to *H*'s in income generated from such earnings but is greater, and income splitting would not be allowed. The same would also be true for profits from *H*'s uncommingled earnings, as *H*'s management power over them would, under the theory, be upgraded to a vested, proprietary interest. Surely the 1927 legislature did not intend to adopt a theory of ownership of community property that would forfeit income-splitting benefits if subsequent legislatures decided to give exclusive management to *W* over particular classes of community property.

Moreover, if the commentators' theory is accepted, after the 1975 reforms the income from a business which CAL. CIV. CODE § 5125(d) (West Supp. 1975) empowers *H* or *W* alone to manage probably could not be split on separate tax returns filed by *H* and *W* but only on a joint return; each spouse would have greater proprietary interests than the other in the income from such business he or she alone managed under the power granted by § 5125(d), at least so long as such profits remained in the business.

It may be, however, that the Supreme Court will allow splitting for income and estate taxes if *W* has any ownership interest in the community property—that it need not be equal to *H*'s. The Court has not had to decide such a case since, prior to Louisiana's adoption in 1973 in *Creech v. Capitol Mack, Inc.* of an unequal co-ownership theory, the only theories of community ownership available for the Supreme Court

The commentators' theory that the 1927 legislation gave *W* as well as *H* vested management rights has never been accepted by the courts and certainly should not be accepted now, if for no other reason than that chaos would result from having to litigate in hundreds of cases whether blocks of pre-1975 funds consisted solely of uncommingled earnings of *H*, who had little incentive under pre-1975 law to segregate his earnings.

6. *Retroactivity of the Management and Control Provisions to Pre-1927 "Community" Property*

*Spreckels* is, of course, directly in point when it comes to the validity of applying section 5125 and 5127 to pre-1927 "community" property or the fruits, rents, and profits thereof. Undoubtedly there are several thousand California couples possessing community property that is still subject to the forced-heir system. The married couple would have had to have been domiciled in California and to have made an acquisition by onerous title of property prior to July 29, 1927. The problem of applying equal management to pre-1927 property will seldom arise, however, if the courts are careful to avoid unnecessary findings that property is traceable to pre-1927 acquisitions. Moreover, several theories can be advanced to apply the management and control provisions of the reform package retroactively even to property that is concededly acquired before 1927.

a. *Identifying pre-1927 community property*: The total amount of property even arguably subject to *Spreckels* should be reasonably small. First, the amount of property acquired over 48 years ago by married couples is naturally quite small due to attrition. Second, all pre-1927 property that has been commingled with post-1927 community property ought to be treated as true community property and therefore not subject to *Spreckels*. Third, a presumption should be indulged that any property acquired after 1927 is true community property unless there is a clear showing that such property had its source in a pre-1927 acquisition. Finally, pre-1927 property that has been made productive by post-1927 community efforts should not be apportioned and should therefore be treated as true community property in its entirety.

To come under *Spreckels* the pre-1927 property probably must not have been commingled beyond tracing with post-1927 community

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to evaluate were the equal ownership theory and California's forced-heir theory. See note 453 and accompanying text *supra*, regarding taxation under *Creech*.

property since the rule in the case of separate property so commingled is that it becomes community.<sup>429</sup> Although California courts actually called pre-1927 property "community" or "common" property, functionally, it was *H*'s separate property in which *W* had a forced heir's interest and powers to veto gifts and transfers of realty and household furnishings.<sup>430</sup> The policy behind the commingling rule is that the interests of both spouses together are more deserving of protection than those of the one who could have prevented the commingling.<sup>431</sup> It should follow that the courts will opt for a rule that the commingled mass is presumptively true community property because that is more beneficial to *W*, who most likely had no control over the pre-1927 community property that became commingled.<sup>432</sup>

By the same logic, the courts ought to presume that property presently possessed<sup>433</sup> by spouses married before 1927 is true community

429. See, e.g., *See v. See*, 64 Cal. 2d 778, 784, 415 P.2d 776, 780, 51 Cal. Rptr. 888, 892 (1966). However, a small bit of community property may be merged into the separate estate. *Estate of Cudworth*, 133 Cal. 462, 65 P. 1041 (1901).

430. See note 280 *supra*.

431. See Bonanno, *supra* note 36, at 103, discussing how he would handle commingling of pre-1975 and post-1975 property if equal management could not apply to pre-enactment acquisitions.

432. *W* could have been responsible for the commingling: (1) if *H* had permitted *W* to assume management of the pre-1927 community property and she combined it with post-1927 property, or (2) if the post-1927 property involved in the commingling were *W*-managed under former CAL. CIV. CODE § 5124, which, under the thesis of this Article, was fully retroactive with respect to all of *W*'s post-1927 uncommingled earnings and community property personal injury damages.

433. Notwithstanding the fact that numerous cases purport to find in CAL. CIV. CODE § 5110 (West Supp. 1975) (formerly § 164) a *presumption* favoring community property (e.g., *Estate of Jolly*, 196 Cal. 547, 238 P. 353 (1925) (pre-1927 "community" property); *Falk v. Falk*, 48 Cal. App. 2d 762, 120 P.2d 714 (1941); *In re Estate of Donohoe*, 128 Cal. App. 544, 17 P.2d 1010 (1933)), there is no statutory presumption in California favoring community over separate ownership. Section 5110 *defines* community property. To state as do scores of cases that because of § 5110's definition of community property—all property acquired during marriage other than separate property—there is a presumption that acquisitions *during marriage* are community is to confuse the definition of community property with the favor such form of ownership enjoys in the law. Under Spanish law, all property of the spouses was presumed to be community. See PRINCIPLES, *supra* note 223, § 60. In some states this has been codified. See TEX. FAM. CODE § 5.02 (1975); LA. CIV. CODE art. 2405 (Slovenko 1961); accord, FRENCH CIV. CODE art. 1402 (H. Cachard transl. 1930). Although "acquired during marriage" is part of the definition of community property under § 5110, it is not an element necessary to raise the civil law presumption. The presumption has been erroneously stated in most California cases because it made no difference whether "acquired during marriage" was an element of the presumption, the date of acquisition of the property being known. In one case where it did make a difference, *Lynam v. Vorwerk*, 13 Cal. App. 507, 110 P. 355 (1910), the correct presumption was applied—all property possessed by one spouse or both is presumptively community property. A contrary

property. Since prior to 1927 the presumption favored that form of ownership that was fairest to both spouses (*W*'s forced heir's share in community property being preferable to a barrable expectancy in *H*'s separate property), so should the post-1927 law of presumptions favor true community property over both separate ownership and forced-heir community property.<sup>434</sup>

In any event, even under present law, any change in form of assets after 1927 will cause the presumption of true community ownership to attach. In *Bone v. Dwyer*,<sup>435</sup> *H* purchased realty some 5 years after the 1917 act that required *W*'s joinder in conveyances of community realty. In 1922 *H* conveyed it without *W*'s joining in the instrument, and she brought timely suit to set aside the transfer. The couple had been married in 1903, so it was very possible that pre-1917 funds were used to buy the land. However, the date of acquisition of the

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decision, *Fidelity & Cas. Co. v. Mahoney*, 71 Cal. App. 2d 65, 161 P.2d 944 (1945), is erroneous and should be disapproved. The insurance policy at issue there was in fact acquired during marriage; the only uncertainty was the date of acquisition of the money used to purchase it. Even under the "acquisition" formula of the presumption, the policy was presumptively community property in *Mahoney*—not, as the court held, separate. The inability to determine when the money was acquired merely meant that the presumption of community ownership could not be overcome. The *Mahoney* court's erroneous refusal to apply the correct "possession" formula of the presumption to the money merely compounded the errors committed in that case.

Fashioning a presumption that property now in a spouse's possession is true, post-1927 community property, rather than pre-1927 forced-heir community property, would not require disapproval of cases indicating that there is no presumption whether property was acquired before or after enactment of a nonretroactive statute changing the law of management and control. See *Scott v. Austin*, 57 Cal. App. 553, 207 P. 710 (1922); cf. *Schubert v. Lowe*, 193 Cal. 291, 223 P. 551 (1924); *Mears v. Mears*, 201 Cal. App. 2d 408, 412-13, 20 Cal. Rptr. 214, 217 (1962). The presumption I propose deals directly, like the presently recognized presumption, with ownership, not management and control.

434. Not only should the courts presume that property is post-1927 property because such a presumption promotes policies of fairness and equality embodied in the 1927 statute converting California from a forced-heir to a true community property system, but also such a presumption is at least presently appropriate because of the great likelihood that property now possessed by a couple married for many years was in fact acquired in the years since the 1927 statute took effect rather than in the fewer years the marriage existed prior to 1927. "Presumptions arise from the doctrine of possibilities." *Judson v. Giant Powder Co.*, 107 Cal. 549, 556, 40 P. 1020, 1021 (1895) (speaking in the context of presumptions of negligence). It is simply improbable that much of the property possessed by a couple married some 48 years or more was not acquired in the last 48 years. See also *Estate of Cashwell*, 105 Cal. App. 475, 288 P. 102 (1930) (presuming property possessed after a long marriage is community rather than separate without requiring the time of acquisition to be proved).

435. 74 Cal. App. 363, 240 P. 796 (1925). But see *Fidelity & Cas. Co. v. Mahoney*, 71 Cal. App. 2d 65, 161 P.2d 944 (1945), an erroneous decision discussed at note 433 *supra*.

real property was 1922, and the court presumed that the law in effect at that time governed the property unless *H* could trace the purchase money back to a pre-1917 source.

As an alternative to a presumption that property possessed by a couple married before 1927 is post-1927 community property, the goal of facilitating application of the 1975 reform laws can be achieved by judicious placement of the burden of proof on the party claiming that the property was acquired prior to 1927. The question of whether the 1975 reforms can apply to pre-1927 community property will usually arise when *W*'s creditor levies on such community property, relying on *W*'s power under the 1975 reforms to obligate and manage "the community personal property, whether acquired prior to or on or after January 1, 1975."<sup>436</sup> *H* will intervene and oppose the levy on the ground that the statutes relied on are unconstitutional as applied—*i.e.*, that the property sought to be seized is pre-1927 community property and therefore subject to *Spreckels*. On the question of constitutionality, *H* is the moving party seeking relief on a set of facts alleged by him; unconstitutionality will, of course, not be presumed. As the moving party, *H* should be assigned the difficult burden of tracing the property at issue back to a pre-1927 acquisition.<sup>437</sup>

The problem of apportionment, arising when income is generated by a spouse's use of his or her post-1927 labor to make pre-1927 community property productive, is more difficult. Where such labor is applied to true separate property, *Beam v. Bank of America*<sup>438</sup> requires that some gain be allocated to the community estate and some to the separate estate by one of two formulae.<sup>439</sup> Should the forced-heir community property be treated as creating an "estate" like separate capital under *Beam*? *Boyd v. Oser* would suggest that it must be.<sup>440</sup>

436. CAL. CIV. CODE § 5125(a) (West Supp. 1975). Section 5127 contains similar language with respect to community realty (CAL. CIV. CODE § 5127 (West Supp. 1975)), and § 5116, providing for creditors' rights, applies by its terms to "[t]he property of the community." CAL. CIV. CODE § 5116 (West Supp. 1975).

437. Compare *Scott v. Austin*, 57 Cal. App. 553, 556-57, 207 P. 710, 712 (1922).

438. 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971).

439. These are the *Pereira* formula (from *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488 (1909)), which calculates a fair return for the separate capital by applying the legal or other appropriate interest rate and attributes the rest of the gain to labor and therefore makes it "community," and the *Van Camp* formula (from *Van Camp v. Van Camp*, 53 Cal. App. 17, 27-28, 199 P. 885, 889 (1921)), which calculates a fair salary for the labor, the "community" share of the gain, and treats the balance as profit from the separate capital, hence making it separately owned.

440. 23 Cal. 2d 613, 620, 145 P.2d 312, 316 (1944). See note 321 and accompanying text *supra*.

Yet the policy of the state ought to be against perpetuating the forced-heir system of community ownership, which resulted from an erroneous understanding of *Febrero*, and the post-1927 product of pre-1927 property should be treated as true community property. If it is felt that an apportionment is constitutionally required, the simplest rule to apply might be fashioned from Arizona's all-or-nothing approach to apportionment<sup>441</sup>—all the income would be treated as post-1927 community property unless *H* could clearly establish that the pre-1927 community capital was the primary factor in generating the income.

The proposed general presumption, commingling rule, and non-apportionment rule should greatly reduce the quantum of pre-1927 property to which *Spreckels*, as limited by *Addison*, still applies. Most suppliers asked to give credit to wives of pre-1927 marriages ought to be satisfied that such rules of law, coupled with the overwhelming probability that most wealth possessed by a couple married over 48 years was acquired during the last 48, mean that *W* is empowered to manage and by her contract render liable the community property of the marriage. It seems obvious that credit-vendors will be less concerned about a couple's community property being pre-1927 than about the possibility that there is a "separate-property marriage."<sup>442</sup>

b. *Theories in support of retroactive application to pre-1927 property*: Nevertheless, undoubtedly the case will arise where a creditor attempts to levy on pre-1927 community property on a debt contracted by *W*, and the courts will have to decide whether Civil Code sections 5125, 5127, 5116, and 5122 can be applied retroactively to such property.<sup>443</sup> To avoid discrimination against elderly women, com-

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441. *Porter v. Porter*, 67 Ariz. 273, 195 P.2d 132 (1948); *Anderson v. Anderson*, 65 Ariz. 184, 177 P.2d 227 (1947); *In re Estate of Torrey*, 54 Ariz. 369, 95 P.2d 990 (1939).

442. See generally Bodenheimer, *The Community Without Community Property: The Need for Legislative Attention to Separate-Property Marriages Under Community Property Law*, 8 CAL. WESTERN L. REV. 381 (1972).

443. Only the management section (§ 5125) would be involved if the issue were the validity of *W*'s attempt in 1975 to sell pre-1927 community personal property.

It is curious that Louisiana has been able to move from the forced-heir system first adopted in *Guice* to the equal-ownership system in *Phillips v. Phillips*, 160 La. 813, 107 So. 584 (1926), and *United States Fidelity & Guar. Co. v. Green*, 252 La. 227, 210 So. 2d 328 (1968), and then to an unequal co-ownership system in *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973), without engendering a host of retroactivity cases. Where the change in the law does not work an outright taking of property, the Louisiana courts seem to permit it to apply to pre-enactment acquisitions.

Louisiana has held that a statute cannot apply retroactively to switch ownership interests of *H* and *W* in marital property. *LaFleur v. Guillory*, 181 So. 2d 323 (La. Ct.

pared with wives of post-1927 marriages, and to have a uniform system of law in the state, the courts will surely search for a reasonable basis for applying the 1975 reforms to pre- as well as post-1927 community property. There are two bases for doing so: (1) overruling *Van Maren* and the other cases that established a forced-heir system of community property, not only because they are historically erroneous but also because of their unconstitutional sex discrimination; and (2) recognizing that *W* has but a mere expectancy in pre-1927 community property and construing the 1975 reforms as giving her equal management thereof, not in a capacity as co-owner, but as agent of *H*.

(i) *Overruling the forced-heir theory cases*: First, *Panaud*, *Van Maren*, and all of the other cases establishing a forced-heir system of community property may be overruled. They are certainly erroneous in equating *W*'s interest under the Spanish-Mexican system of community property with the English common law concept of the "expectancy" of an heir. It is believed that the concept of vested vs. expectant interests was unknown in Spanish community property law.<sup>444</sup> The error in the early California decisions stemmed partly from the mistranslation of Febrero and the focus on one small passage of his treatise rather than the entire chapter on community property and partly from the apparent unfamiliarity of California's common-law trained justices with basic civil law concepts. One of those concepts is "patrimony," and it was critical in the Louisiana Supreme Court's recent re-examination of *W*'s interest in community property in Spanish law.<sup>445</sup>

The recent *Creech* decision by the Louisiana Supreme Court, the product of justices trained in the civil law and sitting in a civil law state, should persuade the California Supreme Court of the fundamental error it committed years ago when it characterized *W*'s interest in Spanish community property as the expectancy of an heir. The court in *Creech*, after a careful study of Spanish authorities, held that community property was not part of *W*'s patrimony because it was not liable for her debts. However, relying in part on the very passage of Febrero that the California forced-heir decisions cited, the court concluded that

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App. 1965). Compare *McElwee v. McElwee*, 255 So. 2d 883, 888 (La. Ct. App. 1972) (switching of interests lawful because it resulted from applying what was essentially a control statute to pre-enactment acquisitions).

444. Evans, *The Ownership of Community Property*, 35 HARV. L. REV. 47, 50 (1921). Cf. Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 11 (1969) (property such as pension benefits, life insurance benefits, etc., which raise the issue were unknown when community property rules developed in Spain).

445. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497, 504 (La. 1973).



*W* did have an ownership interest in community property; it was simply an "imperfect" ownership because *W* could not bind the property to pay her debts.

Adoption of the *Creech* theory would not be an abandonment of the strong position the California Supreme Court took in *Stewart v. Stewart* and other cases that it would not tamper with property concepts to give Californians a tax break. The "imperfect-ownership" theory of *Creech* is not the equal-ownership theory that had been urged on the California Supreme Court and consistently rejected. The implications of *Creech* are that the equal-ownership concept is as foreign to the civil law understanding of community property as the "expectancy" theory. Adoption of *Creech* in California to characterize ownership of pre-1927 community property would constitute the adherence to the civil law (and to Febrero, for that matter) that the early decisions sought to achieve, while discarding the false and misleading English common law characterization of *W*'s interest as an "expectancy."

In my opinion, recharacterization of pre-1927 community property under the imperfect-ownership concept of *Creech* would make the *Spreckels* rationale inapplicable to statutes altering management and control. It is one thing to confer equal management on an heir, quite another to upgrade imperfect ownership to perfect ownership by conferring management power on *W*.<sup>446</sup> It seems far more reasonable to give the privileges of present enjoyment of property to one who is viewed under the law as a co-owner than to one who is a mere heir.

Overruling the forced-heir theory cases could be viewed as a technical "taking" of half ownership of the property from *H* and awarding it to *W*. In addition, such a course would repudiate the assurance given in *Spreckels* and *Stewart* that the forced-heir theory was a rule of property in California.<sup>447</sup> Such a declaration is a judicial promise that titles dependent on a firmly established rule of property law affecting devolution of property by deed, will, or descent will not be disturbed.<sup>448</sup>

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446. It is important to note that the United States Supreme Court upheld the constitutionality of retroactive application of the New Mexico statute requiring *W*'s joinder in transfers of community realty by *H* not on the ground that *W* was an equal owner, but because her interest was more than the expectancy of an heir. *Arnett v. Reade*, 220 U.S. 311, 320 (1911). The court said it was unnecessary to further define *W*'s interest. She had some proprietary interest; thus it was reasonable to insert her into the management process so she could act to protect that interest. Under *Arnett*, *W*'s imperfect ownership recognized by *Creech* clearly makes legislation giving her some role in management reasonable and therefore constitutional.

447. See note 330 *supra*.

448. See note 324 *supra*.

However, if the forced-heir theory cases are overruled prospectively, in the sense of not overturning any transfers made prior to the overruling, the protection extended by declaring a property law concept to be a "rule of property" would be largely preserved.<sup>440</sup> All persons, whether donees, legatees, or purchasers, deriving any interest in community property from *H* on the basis that the property was his alone would be unaffected by the "prospective" overruling.<sup>450</sup> The decision would convert from the forced-heir system to the imperfect-ownership system of community property only pre-1927 acquisitions and their fruits that were still owned by *H* and in which *W* still had a forced heir's interest.

This technical switching of ownership would cause little prejudice to *H*. Surely no *H* earned money during marriage in reliance on the forced-heir theory of community property.<sup>451</sup> Assuming all pre-1891 marriages are now dissolved by death, the *H* we are concerned with will have acquired his pre-1927 community property under a system where he could not give away the property and could not devise or bequeath more than half of it. To now tell the pre-1927 *H* that his heir expectant actually has some ownership interest in the other half of this property will in most instances not defeat any reliance interests of *H*.

Unfortunately, there is one area where reliance interests may be upset—estate planning. Wills may have been drafted in reliance on

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449. See notes 323-29 and accompanying text *supra*; "Prospective" Application, *supra* note 215, at 483; *cf. Marital Property*, *supra* note 174, at 268-69.

450. The California Supreme Court has at times freely jettisoned a "rule of property" that tended to defeat important public policies even though this resulted in a "taking" of a person's property. *Gion v. City of Santa Cruz*, *Dietz v. King*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), is a good example. In *F.A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 448, 150 P. 62, 68 (1915), it was laid down that a public use of unenclosed, uncultivated land would be deemed to be under license of the owner, with the result that no prescriptive public easement or implied dedication could arise. In *Gion-Dietz* this rule was rejected, and instead the landowner was held to have made a dedication unless he affirmatively proved he granted a license to the public or attempted to prevent public use. 2 Cal. 3d at 41, 465 P.2d at 57, 84 Cal. Rptr. at 169. The new rule was applied retroactively to a public use occurring years before it was announced, and it will surely defeat the expectations of purchasers and landowners in the state who acquired land previously used by the public or who did not exclude the public in reliance on the *Hihn* presumption. The opinion supports the new rule with a discussion of the public policy in California of opening access to beaches and other recreation areas. 2 Cal. 3d at 42-43, 465 P.2d at 58-59, 84 Cal. Rptr. at 170-71.

The upshot of *Gion-Dietz* is that a "rule of property" that is interfering with a strong public policy is not sacred. Fair and equal treatment of married women would seem to be such a policy.

451. See *Aero Spark Plug Co. v. B.G. Corp.*, 130 F.2d 290, 297-98 (2d Cir. 1942) (Frank, J., concurring), and authorities there cited.

the theory that *H* alone is the owner of pre-1927 community property, that it qualifies for the marital deduction,<sup>452</sup> and so forth. Although one cannot be certain, there is a good chance that the IRS will treat *Creech* community property like post-1927 California community property, recognizing *W* as owner of a half interest and viewing patrimony as irrelevant to the taxation incidents of the interests of the spouses in community property.<sup>453</sup> It seems an insufficient answer to argue that *H* can go back to his attorney and have a new will drafted. Some husbands may now be mentally incompetent to make a new will; others may die before a new estate plan can be worked out. Moreover, it is possible that irrevocable gifts have been made or trusts established with the thought that pre-1927 community property retained by *H* would be taxed as if it were *H*'s separate property. Perhaps, too, transfers that would have been made years ago, had it been known that pre-1927 community property was to be treated as owned by *H* and *W*, will, if made after the overruling of the forced-heir cases, fail to achieve the desired effects due to the contemplation-of-death presumption if the donor dies within 3 years of the gift.<sup>454</sup>

(ii) *Making W H's agent to deal with pre-1927 property:* The California courts could interpret amended Civil Code sections 5125 and 5127 as appointing *W* the agent of *H* to manage pre-1927 community property and bind it in favor of creditors. *H*'s proprietary interest in the property would be undisturbed.

To uphold such a theory would require overruling *Spreckels*, *Duncan*, and *Roberts* and permitting a far greater disturbance of *H*'s privileges and benefits as owner than the impairments these cases struck down as arbitrary legislation in violation of due process. The 1891, 1901, and 1917 enactments did not affirmatively confer management power on the heir, *W*, but gave her a veto power that would enable her to protect her expectant interests. That is, if *W* wants to inherit half of community property Blackacre, she can veto *H*'s gift or sale of it. But to give her the power to lease it for less than a year, to sell the crops grown on it, and so on, goes much further than protecting her expectancy as an heir. The "protection" theory would be unavail-

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452. 26 U.S.C. § 2056 (1970).

453. It must also be noted that the IRS could readily take the position that if *W* gets equal management and control of pre-1927 community property on any theory, such as her acting as *H*'s agent, this is the practical equivalent of the equal ownership that wives have in post-1927 community property, and it is irrelevant that California courts still purport to treat pre-1927 community property under the forced-heir system.

454. See 26 U.S.C. § 2035 (1970).

able as an explanation of the reasonableness of giving *W* management powers over *H*'s pre-1927 community property under the 1975 reforms.

It seems clear from *Spreckels* that inserting *W* into the management process involves no taking of proprietary or vested rights of *H* and that requiring him to share management powers with *W* is constitutional unless unreasonable because of arbitrariness. The argument for reasonableness would be as follows. Community property is in most marriages the source of support of the spouses and children. Especially in the case of pre-1927 marriages, it was customary for *W* not to work but to take care of the home and children. It would be she who would buy food, clothes, appliances, etc. It would have been a cumbersome business for her to have to carry with her a power of attorney or agency agreement signed by *H* whenever she wished to make such a purchase on credit. Therefore, to facilitate the typical family arrangement, the legislature made *W* *H*'s agent as a matter of law.<sup>455</sup>

The problem with this argument is that the equal management reform effective in 1975 does not limit *W*'s power to manage and obligate community property to transactions related to the needs of the family. If she buys paint and linoleum to refurbish her separately-owned house, which she rents out or lets her mother occupy, community property will still be liable under present sections 5116 and 5125. And if the court attempts to save the constitutionality of sections 5116 and 5125 with respect to pre-1927 community property by limiting *W*'s management to community-related transactions, the social purpose of the reform legislation will not be achieved. The credit-vendor will not know, when *W* seeks to make a purchase, whether it is for the community or for her own separate purposes and can reasonably refuse her credit.

(iii) *Unconstitutionality of the pre-1927 forced-heir system*: The case for the constitutionality—reasonableness under all the circumstances—of a prospective overruling of *Van Maren* and the other forced-heir decisions in favor of some form of co-equal ownership of pre-1927 community property or of distinguishing or overruling *Spreckels* to permit *W*, the forced heir, to have management powers as agent of *H* is greatly strengthened by the unconstitutionality of the pre-1927 community property system.

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455. In France, an act of 1942 empowered *W* to act as *H*'s agent to bind *H*-managed community property when *W* purchased household goods. Comment, *French Reforms in Domestic Law*, 35 LA. L. REV. 134, 138-39 (1974).

The rankest discrimination in the pre-1927 system concerned ownership of *W*'s earnings. As a "sole-trader" businesswoman, *W* might have been able to make her earnings her own,<sup>456</sup> but in most cases, even if she went out and found a job and earned money (perhaps while her lazy *H* earned nothing), the earnings were community property and thus owned by *H*,<sup>457</sup> *W* having the mere expectancy of an heir. Of course, she had only the same expectancy in *H*'s earnings.

Since 1879, the California constitution has contained provisions interpreted as mandating equal protection of the law, similar to the equal protection clause of the federal fourteenth amendment.<sup>458</sup> All existing pre-1927 community property has thus been acquired under a legal system that put some restraints on the legislature and judiciary in fashioning discriminatory laws. As of 1971, sex is a suspect classification under *Sail'er Inn, Inc. v. Kirby*.<sup>459</sup> Especially where a sexually discriminatory statute impairs the ability of a woman to earn money, a sexually discriminatory law will be declared unconstitutional unless it is established that there is a "compelling state interest" justifying the discrimination and that the discrimination is "necessary" to achieve the state's

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456. CAL. CIV. PRO. CODE § 1811 *et seq.* (West 1972). Section 1819 makes profits of *W*'s "sole trader" business her separate property. The statutes date from 1872, a period when the marital property laws strongly discriminated against wives. The sole trader statutes many years ago were arguably reasonable in providing wives a limited way to escape the unfairness of the pre-1927 community property system. Today, with equal ownership and equal management, § 1811 *et seq.* are plainly unconstitutional because of sex discrimination. No reason exists after January 1, 1975, for providing to married women, but not married men, a statutory method for making the fruits of their labor separate property. The sole trader statutes should be repealed. The spouses may contract together to make their earnings separate if they wish to do so.

457. *Washburn v. Washburn*, 9 Cal. 475 (1858). *See also* *Street v. Bertolone*, 193 Cal. 751, 754, 226 P. 913, 914 (1924); *Martin v. Southern Pac. Co.*, 130 Cal. 285, 286, 62 P. 515, 515 (1900) (stating that *W*'s earnings were just as much "community" property as *H*'s). In those days "community" ownership meant ownership by *H*.

458. Section 11 of article I provides: "All laws of a general nature shall have a uniform operation." Section 21 of article I provides:

No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

In *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 15 n.13, 485 P.2d 529, 538 n.13, 95 Cal. Rptr. 329, 338 n.13 (1971), these sections were held to impose by California law an equal protection mandate substantially the same as the federal equal protection clause. However, the *Sail'er Inn* decision, applying California law, made gender a suspect classification like race, even though a majority of the United States Supreme Court had not done so. *Cf. Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 95 S. Ct. 1225, 1235 (1975) (sex discrimination in Social Security Act "entirely irrational").

459. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). *See* note 458 *supra*.

compelling interest.<sup>460</sup> Under *Sail'er Inn*, the pre-1927 law making *H* the owner of *W*'s earnings cannot possibly stand. Even assuming that there is a compelling state interest in making one of two persons with an interest in property the manager thereof to facilitate certainty in economic dealings, that goal could be achieved, as it was for community property acquired after 1927, by superimposing (as did Texas, Washington, Idaho, and New Mexico) male or one-spouse management on an equal-ownership system. The benefits of male management cannot supply a compelling interest for denying *W* a share of ownership in her earnings.

However, it seems quite unnecessary to apply the "suspect classification" rule of *Sail'er Inn* to pre-1927 acquisitions in order to hold the pre-1927 law unconstitutional. Under the "any-rational-basis" test of equal protection, male management may be valid, but denying *W* any share of ownership of her earnings cannot be. There is only one possible reason for the forced-heir theory of community property in California—a few justices thought that was how Febrero described the system that existed in Spain and Mexico. We now know from *Creech* that the California courts misconstrued Febrero, thus making even any purely historical basis for the forced-heir system questionable. In any event, even assuming that Febrero was correctly interpreted in the early California decisions and that what he wrote accurately described Spanish-Mexican law, the mere fact that such was the law of Spain hardly satisfies the any-rational-basis standard. Febrero also noted that if *W* commits adultery, or converts to Islam, Judaism, or other non-Catholic sect she forfeits all interest in the community property;<sup>461</sup> likewise "if she goes to the house of a suspicious man."<sup>462</sup> Even when *W* acquired perfect ownership of half the community property on *H*'s death, she would forfeit this to *H*'s heirs if she "live[d] dishonorably as a widow."<sup>463</sup> Manifestly, constitutional problems with these rules are not eliminated simply because such was the law of Spain.

Since the desired one-spouse management (*i.e.*, husband's) could be achieved by superimposing male management on a system recognizing co-ownership of the community property, there was and is no rational basis for the rule that *W* was a mere heir with respect to her own earnings.

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460. 5 Cal. 3d at 16-17, 485 P.2d at 539, 95 Cal. Rptr. at 339.

461. FEBRERO MEJICANO, *supra* note 241, § 33.

462. *Id.* § 29.

463. *Id.* § 35.

It has been suggested that sexually discriminatory community property laws discriminate against *W* because she is married, not because of her gender.<sup>464</sup> This is obviously erroneous. Both *H* and *W* are married. Within the class of married persons, the pre-1927 law conferred on *H* ownership of all onerous acquisitions during marriage and did so because of the nature of his genitalia. In addition, as Justice Mack Barham of the Louisiana Supreme Court has pointed out, if community property laws unconstitutionally discriminate against women on their face, this defect cannot be avoided on the theory that *W* has waived the unconstitutionality simply by marrying.<sup>465</sup> There is no freely made waiver but a penalty for invoking the fundamental right to marry.

The constitutionality of the forced-heir rule of pre-1927 community property law depriving *W* of any ownership interest in her own earnings has apparently not been tested under the equal protection provisions of the California constitution. So tested, the rule is patently unconstitutional. Such a holding should apply to any pre-1927 community property still held by *H* if he is still married to the forced-heir *W*. Unless there is some *res judicata* judgment binding *W* to a conclusion that she has no ownership interest in her own earnings, she will be able to assert the equal protection principle. The problem of applying California's equal protection provisions to pre-1927 community property does not involve questions of the retroactive effect of a new constitutional amendment or a radical new interpretation of a constitutional provision (such as making sex a suspect classification in *Sail'er Inn*).<sup>466</sup> It does not involve reliance interests of third parties. It does not involve overturning judgments. Where no ownership dispute between *H* and *W* has previously arisen, it cannot involve a statute of limitations, laches,

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464. McKnight, *supra* note 2, at 48.

465. Barham, *supra* note 2, at 563 (writing of discriminatory management and control laws, primarily). Justice Barham proposed a system where at the time of applying for a marriage license the bride and groom complete and file a contract between them opting for male management, female management, dual management, or equal management. Such a scheme would certainly cure the existing problem in Louisiana law concerning management and control where a woman has no choice: either don't marry or don't control your earnings. See also *Klein v. Mayo*, 367 F. Supp. 583 (D. Mass. 1973) (sex discrimination in tenancy by entirety law not invalidated because spouses could have opted for similar but nondiscriminatory joint tenancy).

466. See Bonanno, *supra* note 36, at 123-27. The author assumed that all pre-1975 management and control rights are themselves vested property rights that cannot be impaired by §§ 5125 and 5127 but considered whether ratification of a new federal constitutional amendment, the Equal Rights Amendment, would succeed in "taking" such vested rights. He concluded that it would do so, except where third party rights had been acquired in transactions where the parties relied on the prior law.

or estoppel bar to *W*'s assertion of her constitutional rights. Surely the failure of other litigants in the past to raise the constitutional issue cannot bar *W* from raising it now.

For example, suppose the legislature enacted a law empowering any private riparian landowner abutting a polluted stream to enter the land of the polluter and remove whatever equipment or other property was causing the pollution. Thereafter, *X* enters the land of *Y* Co. and removes vats of acid that were leaking acid into a creek. *Y* Co. sues to recover the vats from *X*, and the issue litigated is whether the legislature intended the abater, *X*, to obtain title to the equipment and property he removed. The court holds that such was the legislature's intent. No constitutional issue is raised. Later, *A* enters the land of *B* Co. and removes stores of fertilizer that were polluting a creek. Surely, when *B* Co. sues *A*, the court's decision in the litigation involving *X* and *Y* Co. does not bar *B* Co. from raising the point that to transfer from *B* Co. to *A* title to the fertilizer is unconstitutional.

In sum, the unconstitutionality of the old decisions holding that *W*'s only interest in her own pre-1927 earnings during marriage was that of a forced heir of *H* can be raised today with respect to such "community" property still held by *H*. It does not follow, however, that the remedy for the pre-1927 *W* is to upgrade her expectancy in all pre-1927 community property, either under the *Creech* theory of shared ownership or under the theory that *W* became *H*'s agent to manage pre-1927 property under the 1975 reforms. The unconstitutionality could also be cured by making *W* sole owner of her own pre-1927 earnings with *H* having the expectancy of an heir therein. This "cure" could further provide that in the event of commingling of *H*-owned and *W*-owned community property, either the spouse responsible for the commingling lost all ownership in the commingled mass in favor of an expectancy of an heir or each spouse had a half interest in the mass as owner with an heir's expectancy in the other half. In addition, if it were felt that male management could not withstand the constitutional test applied (such as any-rational-basis), the "cure" rule could give *W* management of community property owned by her and could give both spouses dual or equal management of any commingled masses held to be owned by halves.

It will undoubtedly be argued on behalf of *H* that the latter cure—making *W* owner of her pre-1927 earnings—must be adopted by the courts because it would be far less disruptive of the ownership and management powers of pre-1927 husbands as a class than converting



all pre-1927 community property to the *Creech* form of shared ownership or giving *W* agency powers to manage all pre-1927 community property.<sup>467</sup> Moreover, it will be contended, husbands could reasonably rely on the courts' selecting the cure least disruptive of *H*'s rights under the pre-1927 forced-heir system. Nevertheless, it seems that husbands and their attorneys dealing with pre-1927 community property in the estate planning process ought to have anticipated that shared ownership would be the most likely "cure" for the unconstitutionality to be taken by the courts. Obviously, either cure—the shared-ownership theory or the "to-each-his-own" theory—would disturb some purported ownership interests under the forced-heir system. A working *W* was surely not a rarity prior to 1927. There are likely some pre-1927 marriages where all the forced-heir community income was *W*-earned (e.g., where *W* was putting *H* through school and he was not able to turn his education into income until after July, 1927). The "shared-ownership" cure assures that in no instance of a pre-1927 marriage will *H* be totally deprived of the ownership interest the forced-heir cases purported to confer on him.

In addition, it is in the public interest to treat all California wives equally under the law. Wives in post-1927 marriages share ownership of all community property, and curing the unconstitutionality of the pre-1927 situation by giving *W* a share of ownership of all pre-1927 community property (rather than sole ownership of her own earnings) advances the policy of equal treatment.<sup>468</sup> Therefore, any reliance by *H* that the courts would adopt the to-each-his-own theory is necessarily weak.

The policy of equal treatment also favors adoption of the *Creech* theory of shared ownership rather than the agency theory as the basis for constitutionally applying present sections 5125, 5127, 5116, and 5122 to pre-1927 community property. Thus, even though the *Creech*

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467. The logic of such a contention demands proof by *H* (or judicial notice by the court) that social and economic conditions were such before 1928 that husbands earned much more property than wives.

468. Providing equal treatment of persons was held to constitute a reasonable basis for retroactive application of a statute reviving sovereign immunity after the courts had abolished it, even though such retroactive application extinguished causes of action against governmental entities that had arisen before the enactment. Such a taking of the causes of action put the tort victims affected on a par with previous tort victims who had not been covered because their causes of action had become barred by a statute of limitations before sovereign immunity was abrogated by the court. *County of Los Angeles v. Superior Court*, 62 Cal. 2d 839, 844-45, 402 P.2d 868, 871-72, 44 Cal. Rptr. 796, 799-800 (1965). See also *Retroactive Application*, *supra* note 215, at 522.

theory may frustrate some estate planning done under the assumption that the forced-heir system applied to pre-1927 community property, while the agency theory might not have that effect, adopting *Creech* is the preferable solution to the problem because it results in equal treatment of *W*. *Creech* cures the unconstitutionality of the pre-1927 law in such a way as to make application of sections 5125, 5127, 5116, and 5122 to pre-1927 community property constitutional, and with these statutes upgrading *W*'s imperfect ownership under *Creech* to an equal ownership, no discrimination between wives of pre-1927 and post-1927 marriages would remain. The only factor weighing against this course is the disturbance of estate planning made on the assumption that *H* was the owner of all pre-1927 community property. But the reasonableness of such an assumption is, at best, shaky, due to the apparent unconstitutionality of the pre-1927 law and the likelihood that some form of shared ownership would be the cure fashioned by the courts. Weighing the weak reliance interest against the social policies at issue and the benefits of a uniform rule for all California wives, *Creech* affords a reasonable means for constitutionally applying the 1975 reforms in full measure to all pre-1927 community property.

C. THE CONSTITUTIONALITY OF APPLYING THE CREDITORS' RIGHTS PROVISIONS TO PRE-1975 CONTRACTS AND TORTS<sup>469</sup>

As previously observed, to apply section 5116 to pre-1975 contracts, as expressly intended by the legislature, and section 5122 to pre-1975 torts, as apparently intended, results in transaction-regulating retroactivity. The reform legislation gives pre-1975 creditors more rights than they had under the law when the contract was incurred or breached, or when the tort was committed. Many creditors will be helped by this change; a few will be hurt—namely, those who did not demand security from one spouse in the belief that creditors of the other spouse could not reach community property managed by the first spouse. In the tort situation, *H*'s victim may be harmed by the new legislation when *W*'s victim seizes *H*'s accumulated earnings before *H*'s victim can obtain a judgment. But this does not disturb any reliance interest by the tort victim; surely few people would consider their ability to reach *H*-managed property before riding in a car with him, and

469. This Section considers only post-1927 property. Whether §§ 5116 and 5122 can apply to pre-1927 community property depends on whether *W* can be given management powers in such property retroactively. See text accompanying notes 443-68 *supra* for a discussion of the application of §§ 5116 and 5122, as well as 5125 and 5127, to pre-1927 property.

it is impossible to imagine anyone relying on the community property laws when he crosses the street with the risk that he will be injured by some negligent *H*. There being no reliance interests of the tort victims to protect, only contract creditors can make a colorable case that applying the creditors' rights amendments to pre-1975 obligations is unconstitutional.

In addition, the spouses can object to retroactive application of sections 5116 and 5122. For example, *W*'s 1973 contract did not jeopardize *H*'s ownership interest in *H*-managed property, for, except in the case of necessities, *W*'s creditor could not reach *H*-managed property. *H* can argue that he relied on that state of the law in not attempting to prevent *W* from going deeply into debt. In the area of tort liability, the reliance argument would have to be a bit gauche. *H* would contend as follows. There was no *W*-managed community property. I never let her act in such a position that she became my agent on a community mission; most of her time was spent developing her separate property. Therefore, I determined it was worth the chance to save some money and not obtain insurance covering torts committed by her. I relied on the pre-1975 rule that her tort victims could not reach *H*-managed property, unless she acted as my agent. The odds of *H* convincing the court that he relied on pre-1975 law in not insuring against *W*'s tort liability are slight, but since such a decision in reliance is not inconceivable, the argument should be considered.

1. *Community Debts and Torts, Objections by a Spouse to Retroactivity*

Where a spouse has incurred a community debt prior to 1975, the community has received some benefit. For example, party games purchased on credit have been enjoyed by members of the family and are still probably on hand; a spouse may have enjoyed a relaxing vacation trip purchased on credit; and bicycles bought on credit for mother, father, and children have provided family recreation. While perhaps not necessities, these purchases have provided indirect benefits to the community, enabling the spouses to participate more fully in community endeavors, whether commercial or homemaking. Likewise, liability for a community tort arises out of an activity that did produce, or would have produced but for the accident, benefits to the community.

The pre-1975 law that made some community property (*i.e.*, that not managed by the debtor spouse) not liable for debts that benefited the community or arose out of community ventures created protection

in the nature of an exemption. It has often been held that no one has a "vested right" in a statutory exemption insulating property from creditors.<sup>470</sup> Therefore, statutes removing the exemption may be applied retroactively in favor of pre-enactment creditors. Of course, calling an exemption a "privilege" and not a "vested right" is an unacceptable basis for decision. But the results in the older cases are correct under the contemporary approach of an above-the-board assessment of reasonableness and weighing of interests. Exemptions logically ought to be perceived by debtors as benefits subject to broad legislative control, since it is contrary to the general policies of the law to permit someone to profit from an acquisition and not pay for it or to tortiously injure another person and not pay recompense.

Moreover, in the case of *H*, who claims that he did not attempt to halt *W*'s pre-1975 credit spending spree in which community debts were incurred on the ground that the law then exempted *H*-managed community property from all of *W*'s debts, *H*'s reliance may be unreasonable since the law was tainted with unconstitutionality. The *Sail'er Inn*<sup>471</sup> decision seems to compel a holding that the pre-1975 community property law was unconstitutionally discriminatory insofar as it gave exclusive management to *H* of *W*'s earnings whenever *W*'s earnings were commingled with *H*'s.<sup>472</sup> *H* may have anticipated that this unconstitutional provision would be corrected by providing for equal management only of the commingled property, as was done in Texas.<sup>473</sup> *H* would then argue that he could at least rely on his uncommingled pre-1975<sup>474</sup> earnings not being liable for *W*'s contracts. How-

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470. See, e.g., *Bank of Brunson v. Graham*, 335 Mo. 1196, 76 S.W.2d 376 (1934); *Laird v. Carton*, 196 App. Div. 169, 89 N.E. 822 (1909); *Chandler v. Horne*, 23 Ohio App. 1, 154 N.E. 748 (1926); *Majors v. Carter*, 175 Tenn. 450, 135 S.W.2d 924 (1940); Annot., 93 A.L.R. 177, 185-86 (1934). The California Supreme Court has said that an exemption is a "mere privilege," *In re Estate of Pillsbury*, 175 Cal. 454, 166 P. 11 (1917), and would surely follow the general rule, although the current court would not rely on "vested" or "privilege" labels.

It has been held that to apply a new exemption or statute increasing an exemption retroactively to debts on contracts made or breached before the change in the law is an unconstitutional impairment of contracts. See, e.g., *In re Raurer's Collection Agency*, 87 Cal. App. 2d 248, 196 P.2d 803 (1948); *Medical Fin. Ass'n v. Wood*, 20 Cal. App. 2d Supp. 749, 63 P.2d 1219 (App. Dep't Super. Ct. 1936). The minority rule to the contrary is to be preferred. See, e.g., *Natchitoches Collections, Inc. v. Gorum*, 274 So. 2d 449 (La. Ct. App. 1973).

471. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

472. See former CAL. CIV. CODE § 5124 (West 1970).

473. TEX. FAM. CODE §§ 5.22(b)-(c) (1975).

474. During 1974, *W*'s creditors on contracts made in that year could reach *H*-managed community property to the extent that *W*'s earnings and separate property had been commingled into it. Ch. 987, § 6.5, [1973] Cal. Stats. 1899. But this 1974 in-

ever, the "separate-but-equal" system of Texas is but one method to cure the unconstitutionality of California's pre-1975 community property system. The "concurrent-and-equal" management system that was adopted was just as likely to be the legislature's response to the sex discrimination in the pre-1975 system. And, since the managerial system of creditors' rights has long been adhered to in California, one who could anticipate a conversion to equal management to cure the law's unconstitutionality could reasonably anticipate that once *W* was empowered to use all the community property to pay her debts (equal management), her creditors could compel her to do so. This would include pre-enactment community creditors.

In sum, the reasonableness of any reliance by *H* on continuation of the law that exempted *H*-managed community property from community obligations incurred by *W* is dubious. And, since the community will have obtained some benefit from *W*'s community contract and from the community activity in which *W* committed her community tort, *H* can show no "loss" by retroactive application of sections 5116 and 5122 other than elimination of a windfall exemption that left the holder of a "community" contract debt or the victim of a "community" tort unpaid and uncompensated after *W*'s separate property and *W*-managed community property had been exhausted. What is true for *H* is also true of any reliance argument *W* might make concerning the sanctity of *W*-managed property under pre-1975 law vis-à-vis the claims of *H*'s community creditors. Similarly, the creditors of either *H* or *W* themselves had little reasonable basis for assuming that the exemption of certain community property from liability for community debts would not be lifted.

On the other side of the balance in the weighing process utilized by the courts where rights are impaired by legislative exercise of the police power are: (1) the policy of avoiding an inequitable rule of law that allows a person to have the enjoyment of property and power to manage it while insulating it from his or her creditors; (2) the policy of treating creditors equally and not discriminating on the basis of whether their contract or tort claim involves a pre- or post-1975 transaction;<sup>475</sup> and (3) the ease of administering the judicial and debt-

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terim version of § 5116 of the Civil Code assured *H* no net loss of *H*-managed property because of *W*'s contracts and gave him little basis to complain. (If *W*'s contracts were "community" debts, *H* benefited; if "separate," a *Weinberg*-based reimbursement claim arose.)

475. See ch. 1206, § 1, [1974] Cal. Stats. —, quoted in text accompanying note 121 *supra*.

collection processes when a uniform rule of law is applicable. I predict that the courts will hold application of amended Civil Code sections 5116 and 5122 to pre-enactment community contracts and community torts to be a reasonable exercise of the police power.

## 2. *Separate Debts and Torts*

Constitutionality of retroactive application of sections 5116 and 5122 in the case of *separate* debts and torts of a spouse must be distinguished from instances of community debts and torts, since in the former situation the loss to a spouse occasioned by retroactive application is surely greater. For example, where prior to 1975 *W* buys paint and linoleum on credit to improve her separately-owned rental house, the community receives no benefit; likewise when *W* batters Ms. *X* in circumstances unrelated to a community activity.

If these pre-1975 separate creditors of *W* invoke sections 5116 and 5122 to seize what was *H*-managed community property, the result is, under *Weinberg v. Weinberg*, to substitute for the cash or land taken a cause of action for reimbursement in favor of the community against the spouse incurring the separate debt.<sup>476</sup> All the authority is to the effect that the right of reimbursement cannot be asserted until dissolution of the community by death, divorce, or legal separation.<sup>477</sup> If interest is not owing on the reimbursement claim, productive community property is rendered unproductive—except to the extent *W*'s credit rating is improved by her paying her debts—until the marriage is dissolved. Apparently, interest has never been awarded in a *Weinberg*-based reimbursement claim arising not from the improvement of separate property with community funds (*i.e.*, remodeling a separately owned house) but simply from paying a separate obligation with community funds. Contrary to earlier cases,<sup>478</sup> the most recent California

476. *Weinberg v. Weinberg*, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967). See text accompanying notes 87-88 and note 404 *supra*. Under CAL. PROB. CODE § 205 (West Supp. 1975), the cause of action may not be available after the debtor spouse dies. See text accompanying note 91 *supra*. However, § 205 gives a different type of "compensation" to the surviving spouse that perhaps will support a conclusion that it is constitutional to allow deceased's *W*'s pre-1975 separate creditor to seize a portion of *H*'s interest in the community property. See note 93 *supra* and text following note 481 *infra*.

477. See, *e.g.*, *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497, 510 (La. 1973). But cf. *Conley v. Moe*, 7 Wash. 2d 355, 110 P.2d 172 (1941), where a closely divided court permitted a creditor of the community to seize the community's reimbursement cause of action, although the marriage and the community had not been dissolved. *Conley* does not suggest that a spouse could bring such a "premature" action, however.

478. See, *e.g.*, *Provost v. Provost*, 102 Cal. App. 775, 283 P. 842 (1929), a case

decision dealing with the claim for reimbursement in the improvement context, *In re Marriage of Warren*,<sup>479</sup> does allow recovery of interest. Since the Court in *Weinberg* relied on the "improvement" cases in holding that the payment of a separate debt with community property creates a right of reimbursement, it is probable that reimbursement claims based on *Weinberg* will also carry interest at the legal rate.<sup>480</sup>

Moreover, the California courts could and should reject the rule that the reimbursement claim lies dormant until dissolution of the community. If, shortly after *W*'s separate-judgment creditor seizes community property in satisfaction of his claim she inherits a large sum of separate property, why should the law not provide for an automatic transmutation from separate to community property of a sufficient amount of the inheritance to discharge the reimbursement claim, especially when this would restore to *H* the equal management powers he lost when *W*'s separate creditor struck the community property?

If the law will award interest on a *Weinberg*-based reimbursement claim and permit such a claim to be asserted prior to dissolution of the community, the harm caused to a spouse by applying sections 5116 and 5122 retroactively in the case of separate debts and torts is slight; it should not tip the balance to require a holding that such retroactive application is unconstitutional.<sup>481</sup>

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relied on in *Weinberg* where the California Supreme Court fashioned the reimbursement claim in instances of payment of separate debts with community funds. Under *Provost*, where community funds are used to improve a managing spouse's separate estate, the measure of reimbursement owed the community was the enhanced value resulting from the improvement. Cf. *Hanrahan v. Sims*, 20 Ariz. App. 313, 512 P.2d 617 (1973). Thus, if *H* took \$4,000 of community funds to build a new roof on his separately-owned house (that he rented for separate income) in 1960, and when he died 10 years later the roof was adding \$1,500 in value to the house, that would be the amount of reimbursement. This formula was plainly borrowed from Louisiana law, where it is often reasonable, since profits from *H*'s separate property are community-owned so that the improvement brings some return to the community during marriage. See generally Bartke, *Yours, Mine and Ours—Separate Title and Community Funds*, 44 WASH. L. REV. 379, 385, 393 (1969).

479. 28 Cal. App. 3d 777, 104 Cal. Rptr. 860 (1972) (dictum).

480. But see 42 TEXAS L. REV. 747, 751 (1964), where the writer treating an analogous problem fears that requiring the separate estate to pay legal interest on reimbursement owed the community for community funds directed to a separate use could impose a "staggering burden" on the separate estate.

481. The availability of the *Weinberg* reimbursement claim distinguishes the problem in California from a retroactivity case in Washington. The legislature had broadened creditors' rights by authorizing antenuptial separate creditors of a spouse to reach that spouse's community earnings in certain cases. By pre-enactment law such earnings were immune. In *National Bank of Commerce v. Green*, 1 Wash. App. 713, 722, 463 P.2d 187, 192 (1969), the court held that the statute should be interpreted as prospec-

In summary, retroactive application of the creditors' rights provisions of the reform package is constitutional, regardless of whether the debts or torts at issue are separate or community in character. If community, the community benefits from payment of the debts of either *H* or *W*; if separate, the *Weinberg* reimbursement claim protects the interests of both *H* and *W*.

D. THE CONSTITUTIONALITY OF APPLYING TO PRE-ENACTMENT  
PROPERTY THE PROBATE CODE REFORM REQUIRING  
COMMUNITY FUNDS TO PAY A SHARE  
OF SEPARATE DEBTS

As noted in Part I, new Probate Code section 205 appears to change the law concerning liability of community property upon the death of a spouse. Under prior law, it was very likely that *Weinberg v. Weinberg* gave the surviving spouse a right to compel decedent's estate to pay decedent's separate debts, such as alimony arrearages, out of separate property of the deceased. If the personal representative used community funds to pay such debts, the surviving spouse would have had a claim for reimbursement for half such funds expended. Applicable to estates of persons dying after July 1, 1975, Probate Code section 205 seems to require the community to pay a proportionate share

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tive only to "avoid a claim of impairment of vested rights." The court felt that applying community property to pay *H*'s separate debt would be a "taking" of *W*'s interest. A commentator construes *Green* to mean that pre-enactment community acquisitions could not be taken by the separate creditor but that even a pre-enactment separate creditor could seize post-enactment community property under the new statute. Note, *Community Property—Antenuptial Debts—Eliminating Immunity of Earnings and Accumulations of Debtor Spouse*, 45 WASH. L. REV. 191, 199 (1970). See also, Bonanno, *supra* note 36, at 108-09, asserting that there can be no constitutional problem in applying CAL. CIV. CODE §§ 5116, 5122 (West Supp. 1975) retroactively in the sense that a pre-1975 creditor seizes post-1975 acquisitions.

The doubts about retroactive application of the Washington statute expressed in *Green* have no bearing on the problem of applying §§ 5116 and 5122 retroactively here. That is because the Washington statute at issue in *Green* had, inexplicably, forbidden a *Weinberg*-based reimbursement claim in favor of the community by providing that "for the purpose of this section neither the husband or the wife shall be construed to have any interest in the earnings of the other . . . ." This meant that the statute could have resulted in a taking of the nondebtor spouse's pre-enactment property. See also H. MARSH, *MARITAL PROPERTY IN CONFLICT OF LAWS* 199 (1952) (no taking occurs where reimbursement is given).

The 1973 New Mexico reform act expanded creditors' rights by allowing a separate creditor to seize half the community property. N.M. STAT. ANN. § 57-4A-4 (1973). When this occurs, New Mexico law gives the community a reimbursement claim. *McDonald v. Senn*, 53 N.M. 198, 213, 204 P.2d 990, 999 (1949). Bingaman, *supra* note 14, at 224, urges applying the 1973 New Mexico statute broadening creditors' rights retroactively to all unpaid debts.



of separate debts and to eliminate any reimbursement claim. The new statute is intended to apply retroactively in the sense that community property acquired before July 1, 1975, is made liable, without reimbursement, for separate debts of spouses dying after that date. There is no taking of a pre-enactment cause of action for reimbursement, because section 205 is directed to unpaid primary debts of the post-July, 1975, decedent, not reimbursement claims. What section 205 does, rather, is to create a new unreimbursable liability for community property after a spouse's death, just as sections 5116 and 5122 create new liabilities during marriage.

The imposition by section 205 of a new liability on the surviving spouse's half of the community property will not constitute an unconstitutional taking if the survivor receives something in exchange. For example, if prior to 1975 *H* loaned out his earnings taking a promissory note, *W* lost her half interest in the post-1927 community money lent by *H*. But the law enabling *H* to make the loan without *W*'s consent did not work an unconstitutional taking of *W*'s proprietary rights because the promissory note was substituted for the money, and *W* had a half interest in the note. In sum, a change in the form of a person's rights is not a taking.

Section 205 provides a different type of change of form of the rights of the spouses, and, although the section seems somewhat foolish, it is probably not unconstitutional. The surviving spouse, say *W*, loses the reimbursement claim that *Weinberg* would have given her were community property used to pay the deceased *H*'s separated debts. However, *W* has received something in exchange for the loss of the *Weinberg* cause of action: the right to have had her personal representative "raid" *H*'s property without compensating *H* in the event *W* had predeceased him. One result of this new aleatory arrangement is to reduce the claims litigable at dissolution of the marriage upon death and to simplify devolution of property and payment of debts. Accordingly, if section 205 abrogates *Weinberg* with respect to a spouse's separate debts paid after his or her death, it is nonetheless constitutional.

#### E. THE CONSTITUTIONALITY OF PROSPECTIVE APPLICATION OF THE 1975 REFORM PACKAGE

To apply a statute prospectively only raises an equal protection problem: it discriminates against litigants solely on the basis of when their cause of action arose, when property was acquired, when an act was

done, and so forth. The general presumption that legislation operates only prospectively assumes, however, that the discrimination between pre- and post-enactment cases does not deny equal protection of the law. If that were not so, the legislature would be seriously hobbled, for it would often be unwilling to enact a law reform if the new statute constitutionality must apply retroactively, because such application would impair reliance interests on the pre-enactment law.

There are few cases invalidating laws that are prospective only on equal protection grounds. Implicit in each decision to invalidate retroactive application of the law because of the resulting impairment of "vested rights" is the conclusion that the demands of due process to prevent an uncompensated taking of property override the equal protection guarantee and authorize whatever discrimination results from prospective application of the new rule. But where due process would not be violated by retroactive application of the statute but the statute is made prospective only anyway, the impact of the equal protection clause must be considered.

A recent decision, *Ganschow v. Ganschow*,<sup>482</sup> found an equal protection violation in such a situation. *Ganschow* was reversed by the California Supreme Court<sup>482a</sup> on the basis that it was reasonable to protect support contract relationships made under prior law. But even if the vacated opinion had stood, there are a few problems. A 1971 statute<sup>483</sup> changed the age of majority in California from 21 to 18 effective March 4, 1972. As first enacted, the law was fully retroactive so as to alter pre-enactment support judgments that had ordered a parent to support a child until age 21. But in 1972 the legislature changed its position and provided that "age of majority" in judgments entered before March 4, 1972, meant 21 under pre-enactment law, not 18, so that pre-enactment judgments were not altered.<sup>484</sup> In *Ganschow*, a father objected that requiring him, under a 1967 judgment, to support a child until age 21 was unconstitutional, since fathers similarly situated but subject to a judgment entered after March, 1972, had to support children only until age 18. The court agreed that failure to apply the law changing the age of majority retroactively to the father in *Ganschow* denied equal protection. Not only did the legislation after amendment

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482. 42 Cal. App. 3d 190, 116 Cal. Rptr. 611 (1974).

482a. 14 Cal. 3d 150, 534 P.2d 705, 120 Cal. Rptr. 865 (1975).

483. Ch. 1748, § 23, [1971] Cal. Stats. 3746, amending CAL. CIV. CODE § 25 (West 1954).

484. Ch. 38, [1972] Cal. Stats. 49-50.

discriminate against parents solely on the basis of the date of a support judgment, but it discriminated against children as well. Since the legislature had determined that all persons between 18 and 21 had the intelligence, experience, and capability to be self-supporting and should be emancipated from their parents by law, the classifications drawn in the area of parental duty of support based on the date of a support judgment were without any rational basis.<sup>485</sup> The court further held that the fact that the *Ganschow* father's 1967 judgment was modifiable did not bear on the discrimination resulting by the refusal of the legislature to apply the new age-of-majority law in his case.

If the assumption is correct that the legislature intends to apply section 199 of the Civil Code retroactively to modifiable pre-1975 support judgments with respect to sums owing after 1974,<sup>486</sup> a decision in *Ganschow* by the California Supreme Court similar to that of the court of appeal might have compelled such a holding in any event. The mere fact that one of a nonworking *W*'s children of a prior marriage has a pre-1975 modifiable support judgment provides, in my view, no reasonable basis for giving this child the benefits of Civil Code section 5127.5, allowing *W*'s child to reach almost half of all the community property, while requiring a similarly situated child not fortunate enough to have obtained a pre-1975 judgment to be content with *W*'s earnings under section 199.

More debatable is whether the amendment to Civil Code section 5110, eliminating the presumption that property conveyed to *W* by instrument in her name is her separate property, can constitutionally apply prospectively in disputes between *H* and *W* not affecting third parties. As indicated,<sup>487</sup> all reason for the presumption in such a situation has been eliminated by the retroactive effect given Civil Code sections 5125 and 5127. *W* now has equal management and control of all community property and, if *Creech* is followed, virtually equal ownership of all community property, including that acquired prior to 1927. By eliminating the presumption as to future acquisitions, the legislature has shown that it does not believe *W* needs a special economic benefit under the law because women are generally discriminated against when they attempt to earn wealth.<sup>488</sup> No conceivable reason for applying the amendment to section 5110 in disputes not affecting third party

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485. 42 Cal. App. 3d at 195-96, 116 Cal. Rptr. at 613-14.

486. See text accompanying notes 162-66 *supra*.

487. See text accompanying notes 63-74 *supra*.

488. Compare *Kahn v. Shevin*, 416 U.S. 351 (1974).

rights or expectations appears other than the convenience of having one rule of law applicable to all cases when deeds to *W* must be construed. There is a substantial probability that section 5110's prospectivity provision is unconstitutional in such a case.

One other prospective-only provision in the reform legislation that may raise equal protection problems under *Ganschow* is the provision in the Probate Code reform making amended section 203 of the Probate Code applicable only to estates of persons dying after June, 1975.<sup>489</sup> In amending section 203 to permit surviving *W*s as well as *H*s to take management of community realty from the deceased spouse's personal representative, unless the devisees filed an objection, the legislature determined that women were capable of such management. The widow whose husband died on June 30, 1975, is just as capable of management as the widow whose husband died the next day. However, administrative convenience here may arguably support the discrimination. The personal representative of a pre-1975 decedent *H* may have planned his or her management of the estate (*i.e.*, continuing a business) in reliance on control of the community realty subject to administration. Avoiding the impairment of the management program of the administrator or executor may be a reasonable basis for prospective application of section 203 as amended.

In any event, the question is probably mooted by the fact that pre-1975 section 203 must surely be held unconstitutional for sex discrimination, the likely "cure" for such invalidity being retroactive application of the new section 203 to both spouses, notwithstanding the legislative intent that this change be applied prospectively only.

### CONCLUSION

*Spreckels v. Spreckels: born 1897; died 1927; buried 1975. R.I.P.*

*Spreckels* is dead. At least it is dead with respect to post-1927 community property, which constitutes the great bulk of marital property in California. Pre-1975 management and control powers over post-1927 community property are—to use the familiar labels—nonvested, nonproprietary privileges, since Civil Code section 5105 makes the proprietary interests of the spouses equal. The legislature was free to alter the pre-1975 management and control laws in favor of equal management of all post-1927 community property because section 5105

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489. Ch. 11, § 8, [1974] Cal. Stats. —. See text accompanying notes 23-33 *supra*.

and the *Sail'er Inn* decision precluded any reasonable reliance on the continuation of the old discriminatory scheme.

Like a ghost, *Spreckels* still haunts pre-1927 community property. It and its *Doppelgänger* can be promptly interred once and for all by overruling the forced-heir cases such as *Van Maren* in favor of the *Creech* theory of a shared but unequal ownership of community property by the spouses. *Creech* will make *W* the "imperfect" owner of pre-1927 community property, not just an heir, and it cannot be held arbitrary to confer management powers on one having some ownership interest. The arbitrariness in *Spreckels* of inserting an heir presumptive into management will be beside the mark.

With *Spreckels* out of the way, equal management under sections 5125 and 5127 will be applicable to all community property in California. Since a spouse will be able to use much of such community property to pay all of his or her debts, it becomes reasonable to permit the spouse's creditor to compel him or her to exercise that power. Thus, sections 5116 and 5122, broadening creditors' rights to keep California's managerial system of creditors' rights generally intact may constitutionally apply to pre-1975 obligations.

Sections 5125, 5127, 5116, and 5122 are the crux of the 1975 reforms. It is they that assure California wives of the full economic and commercial benefit of their half ownership of community property. No basis now exists for denying a married woman credit (except in the case of a separate property marriage). The constitutionality of sections 5125, 5127, 5116, and 5122 is the most significant question to Californians. Nevertheless, with the possible exception of prospective-only application of section 203 of the Probate Code, the remaining changes made by the reform package may validly apply either retroactively or prospectively, as the legislature intended. And it is gross sex discrimination in pre-1975 section 203, not a due process problem concerning retroactivity or prospectivity, that raises the primary constitutional problem concerning that provision.

Of course, constitutionality does not equate to common sense. Amended section 17300 of the Welfare and Institutions Code, if not unconstitutional under *Sail'er Inn* for discriminating against married men, is senseless in perpetuating sex discrimination. A sex-neutral scheme for determining when a spouse must support his or her relative out of community property should be enacted. Section 205 of the Probate Code is absurd in rewarding the first spouse to die by permitting

his or her estate to "raid" the survivor's interest in the community property to pay the decedent's separate debts. Perhaps the courts can find some less foolish construction of section 205; otherwise, certainly, it should be repealed.